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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JOHNATHAN CLAYTON, a minor, by CONNIE CLAYTON, his next friend; Steve Blakley, a minor by Tressia Blakley, his next friend; David Mareth, a minor, by Marlene Mareth, his next friend; Mark Flummerfelt, a minor, by Carolyn Flummerfelt, his next friend; Michael Beagle, a minor, by James M. Beagle, his next friend; George Fox, a minor, by Joan Fox, his next friend; Amy Dianne Wolf, a minor, by Frances Ann Wolf, her next friend; Anna Svetlecic, a minor, by Vickie Svetlecic, her next friend; Connie Clayton; Tressia Blakley, Vickie Svetlecic; Walter Welch; Sherry Welch; Robert Mareth; Marlene Mareth; Michael Flummerfelt; Carolyn Flummerfelt; Frances Ann Wolf; Joan Fox; Howard Fox, Jr.; and James M. Beagle,

Petitioners,

vs.

RICHARD M. PLACE; Glen Garrett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry; All in their individual and official capacities and Purdy R-2 School District,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

The fundamentalist churches in Purdy, Missouri preach and believe that dancing is a forbidden sin. As a direct result of pressure exerted by these churches, and for no discernible secular reason, the Purdy School Board has maintained Rule 502.29 of the Purdy R-2 School District which prohibits dancing on school premises. While this no-dancing rule does not refer to religion on its face, the Purdy School Board enforced and maintained the rule in 1986 for the actual purpose and with the primary effect of promoting the religious beliefs of the locally dominant fundamentalist churches. The question presented is:

Whether a public school rule, which is neutral on its face, but which is maintained and enforced for the actual purpose and with the primary effect of promoting the religious tenets of particular religious groups, violates the Establishment Clause of the First Amendment of the United States Constitution.

LIST OF PARTIES

The caption of the case contains the names of all parties, with the following modifications: pursuant to a stipulation by the parties, the district court dismissed David Mareth as a party-plaintiff, and substituted new school board member Launce Bunnell and new school superintendent Sheldon Buxton for former board member Jacqueline Stephens and former superintendent Richard Place, respectively, as party-defendants.

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RICHARD M. PLACE; Glen Garrett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry; All in their individual and official capacities and Purdy R-2 School District,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners herein, by and through counsel, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case entered on September 1, 1989.

OPINIONS BELOW

The opinion of the district court, which ruled in favor of petitioners, is reported at 690 F. Supp. 850 (W.D. Mo. 1988), and is reprinted in the Appendix, *infra*, A-1 – A-16. The panel decision of the United States Court of Appeals for the Eighth Circuit, which reversed the district court's ruling, is reported at 884 F.2d 376 (8th Cir. 1989), and is reprinted in the Appendix, *infra*, A-17 – A-27. By a 5-4 vote, the full United States Court of Appeals for the Eighth Circuit declined to rehear this case *en banc*. The opinions of the four circuit judges who dissented from the denial of rehearing, and would have reversed the panel opinion and reinstated the district court's decision, are reported at 889 F.2d 192 (8th Cir. 1989), and are reprinted in the Appendix, *infra*, A-28 – A-39.

JURISDICTION

The United States District Court for the Western District of Missouri issued its decision on August 1, 1988, holding that respondents' maintenance and enforcement of the Purdy School District's no-dancing rule violated the Establishment Clause of the First Amendment to the United States Constitution. On September 1, 1989, a panel

of the United States Court of Appeals for the Eighth Circuit reversed the trial court's decision. Thereafter, on November 17, 1989, a bare majority of the full United States Court of Appeals for the Eighth Circuit denied a timely petition for rehearing *en banc* by a 5-4 vote. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

A. Factual Background

Purdy, Missouri, is a small community in Southwest Missouri. Petitioners are a group of parents, children and taxpayers in the Purdy R-2 School District. Respondents are the Superintendent of the Purdy R-2 School District and members of the Purdy R-2 School Board. The dominant religious affiliation in the community is fundamentalist Christianity. There is a long and continuing history of religious activities in the public school system, including school prayer and Bible songs which continued into the late 1970's.

The fundamentalist churches in the Purdy community share the religious belief that social dancing contravenes the tenets of their religion and is sinful. Several of the preachers in the Purdy Ministerial Alliance have preached against dancing and have given religious counseling to congregants who dance. Rev. Ted Davis, the

chief spokesman for the opponents of school dancing, testified that he opposed dancing because it is "scripturally prohibited" and because the music associated with dancing is "satanic." The two Purdy Free Will Baptist Churches adhere to the doctrine that dancing is a sin. The First Assemblies of God Church of Purdy forbids dancing by members upon penalty of ex-communication. Members of the First Baptist Church of Purdy prayed for the souls of pro-dance advocates.

The focus of this case involved the Purdy School Board's maintenance and enforcement of its no-dancing rule. Rule 502.29 provides in relevant part:

> School dances are not authorized and school premises shall not be used for purposes of conducting a dance.

It was widely believed among Purdy residents that the rule was a direct embodiment of fundamentalist church doctrine. Because the rule is commonly viewed as a conscious endorsement of this religious tenet, the parents and students of minority faiths (Catholics, Mormons, and Lutherans) are made to feel that the school district considers their religious beliefs to be inferior to those of the majority.

Throughout the years, the school dancing issue has been the most controversial and divisive topic in the Purdy community. In 1978, a Purdy Student Council petition for a dance was voted down by the school board, 4-2. One of the two board members who voted for the dance, Jim Terry, admitted to catching a lot of "flak" from local ministers and was voted out of office in the next election.

Steve Ciafullo, the faculty sponsor for the Student Council in 1978, was terminated after the '78-79 school year because of complaints from people in the religious community over his support for dancing.

In 1984, three highly regarded high school seniors approached the school district superintendent, Dr. Place, about permitting a school sponsored dance. Dr. Place thought that school dances would be a positive experience for the students and agreed that it was time to change the rule. Dr. Place took the proposal to the president of the school board, Glen Garrett, who also agreed that it was time to change the rule but warned Dr. Place: "If it gets out in the community, there will be a lot of people [coming] out of the woodwork." The proposal died after board members Henderson, Keeling, and Negre opposed changing the rule.

In January of 1986, a group of parents approached Dr. Place about permitting a school-sponsored dance so the students would not have to drive long distances on unfamiliar roads to attend "unofficial" school dances. Because he felt that a school-sponsored dance was in the best interests of the children, Dr. Place could not justify the no-dancing rule other than by stating that Purdy was a conservative, religious community. When asked if the rule was in effect because the Baptists opposed dancing, Dr. Place smiled and answered: "Let's just say the Protestants."

In January and February of 1986, school board members were informally polled about a change in the no-dancing rule. School Board President Glen Garrett stated that the rule was in place because dancing was against

the religious convictions of a majority of the community. Board member Allen Keeling told one of the parents that he could not vote for school dancing because it was against the teachings of his church. Board member Jim Terry told another parent that he had voted for school dancing in the past and caught so much flak from the ministers that he did not want to go through that again. Board member Rex Henderson told a fellow member of the Macedonia Free Will Baptist Church that he would not vote to change the rule because dancing was "against our religion." Board member Art Negre told yet another parent that his church preached against dancing.

At the February 10, 1986, school board meeting, petitioners presented their proposal for a school-sponsored dance. No one on the board disputed the information showing different alternatives for funding and supervising school dances. Instead, the board simply said that the "majority" of people in Purdy did not support dancing. Rev. Davis was present and began to speak about his opposition to dancing but before he could continue School Board President Garrett cut him off and said he did not have to give any reasons for his opposition. When asked about the separation of church and state, Mr. Garrett shot back: "You better hope there's never a separation of God and school." The board then tabled further discussion of the issue until its March meeting.

After the February board meeting, Rev. Davis contacted his fellow ministers in the Purdy Ministerial Alliance regarding a "problem" that had arisen. The Purdy Ministerial Alliance consisted of the ministers of the fundamentalist Protestant churches in the Purdy community. Although the group had never spoken out on any public

issue before, the ministers felt very strongly about the school dance issue and they agreed to persuade their members to fight against any change in the no-dancing rule at the March school board meeting.

On Sunday, March 9, 1986, the ministers followed through on their agreement and told their congregants to attend the upcoming school board meeting. During the Sunday School session at the Macedonia Free Will Baptist Church, board member Henderson assured his congregation that there would be no school dancing as long as he was on the school board. Gary "Gabe" Pennell, who had moved to Purdy because of the community's strong religious beliefs as reflected in the no-dancing rule, also told the congregation to attend the March board meeting in opposition to school dancing. Rev. Winfrey of the First Baptist Church of Purdy exhorted his congregation to attend the board meeting to oppose school dancing. Rev. Dement of the First Assembly of God Church also reminded his congregation of the Church's opposition to dancing and encouraged them to attend the board meeting.

In response to the campaign of the Ministerial Alliance, between 250 and 400 people – easily the largest turnout in school board history – attended the school board meeting on March 10, 1986. Rev. Davis presented a copy of the Ministerial Alliance position statement to each member of the school board and read the document verbatim. At the end of his presentation, Rev. Davis asked for a standing show of force, at which time the vast majority of people in attendance rose in unison.

The board retired to a closed session and reached a unanimous consensus that the no-dancing rule would remain intact. None of the defendants acknowledged any discussion regarding the reasons behind the public display of anti-dance sentiment. As the district court found, however, it is doubtful "that it heard the complete story concerning the board members' deliberations of the rule and the religious significance of the opposition to dancing in Purdy." A-12.

On April 18, 1986, plaintiffs filed an application pursuant to the school district's rental policy for a parent-supervised dance. Rev. Winfrey testified that he opposes even the rental of school property for a dance. Although Dr. Place ordinarily handled such requests by himself, he referred this matter to the entire school board. The board met in a special closed session and summarily suspended the rental policy in its entirety. At a later meeting, the board purported to adopt a "no rental" policy. Since then, however, school premises have been used for non-school softball leagues, pick-up basketball games, and an exhibition donkey basketball game.

B. Proceedings in the Lower Courts

Throughout the latter half of 1986, plaintiffs communicated by letter with the Purdy School Board regarding its maintenance and enforcement of the no-dancing rule. In particular, plaintiffs objected to the religious nature of the board's actions. The board did not dispute this fact, but simply responded that they were doing what the "majority" wanted. After exhausting this informal avenue, plaintiffs brought suit under 42 U.S.C. § 1983 in the

United States District Court for the Western District of Missouri, Southwestern Division, seeking nominal damages and declaratory and injunctive relief.

After a four-day bench trial in June of 1988, at which each of the school board members defendants testified, the district court found that the board's after-the-fact efforts to justify their actions on secular grounds were not credible. Based on the overwhelming weight of the evidence, the district court found that the no-dancing rule was inherently religions to the Purdy R-2 School Board, and ruled that the board's maintenance and enforcement of the rule was motivated by impermissible religious purposes. The district court also ruled that the rule violated the "primary effect" prong of the Establishment Clause test, explaining that the rule placed an impermissible imprimatur of official approval on one particular religious belief.

On September 1, 1989, a panel of the United States Court of Appeals for the Eighth Circuit reversed the district court's decision. The panel decision focused on the fact that dancing is a secular activity and that the no-dancing rule was neutral on its face. A timely petition for rehearing was denied by the full United States Court of Appeals for the Eighth Circuit by a 5-4 vote. The four judges who dissented from the denial of rehearing made it clear that they believed the panel opinion should be vacated and that the district court opinion should be affirmed.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly stated that the Establishment Clause prohibits the government "from conveying or attempting to convey a message that . . . a particular religious belief is *favored* or *preferred.*" *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 106 L. Ed. 2d 472, 494 (1989) (emphasis in original) (citation omitted).[1] In upholding the actions of the Purdy School Board, however, the panel decision in this case essentially holds that public school boards may endorse and promote the religious beliefs of a locally dominant religious sect as official school policy so long as the school policy is "facially neutral." This ruling directly conflicts with the precedents of this Court and extends an invitation to governmental bodies across the Nation to actively promote the religious beliefs of the locally dominant sect as officially sanctioned governmental policy. The panel opinion merits immediate and careful review.

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[1] *See also Bowen v. Kendrick*, 478 U.S. 589, ___, 101 L. Ed. 2d 520, 550, 108 S. Ct. 2562 (1988) (O'Connor, J.) (governmental endorsement of "religious doctrines" violates Establishment Clause); *Edwards v. Aguillard*, 482 U.S. 578, 593, 96 L. Ed. 2d 510, 525, 107 S. Ct. 2573 (1987) (invalidating statute designed to advance a "particular religious belief"); *Wallace v. Jaffree*, 472 U.S. 38, 70, 86 L. Ed. 2d 29, 52, 105 S. Ct. 2479 (1985) (O'Connor, J., concurring) (Establishment Clause prohibits government from conveying a message that particular religious beliefs are "favored or preferred"); *Epperson v. Arkansas*, 393 U.S. 97, 106, 21 L. Ed. 2d 228, 235, 89 S. Ct. 266 (1968) (public school policy may not be "tailored to the principles of prohibition of any religious sect or dogma").

A. The Panel Decision Below Conflicts With the Decisions of This Court

The panel opinion plainly misplaces reliance on the fact that dancing is a "secular" activity. While this is true, it completely misses the point that the *opposition to dancing* in Purdy and the resulting decision to retain the no-dancing rule was intended to promote certain religious beliefs. In this respect, the instant case is indistinguishable from *Epperson v. Arkansas*, 393 U.S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968). Although the teaching of evolution is a "secular" activity, this Court ruled in *Epperson* that the Arkansas law prohibiting the teaching of evolution was unconstitutional because the *opposition to evolution* was based on the religious views of the electorate. *Id.* at 107-08, 21 L. Ed. 2d at 236 ("fundamentalist sectarian conviction was and is the law's reason for existence"). Similarly, the maintenance of the no-dancing rule cannot withstand constitutional scrutiny because it was motivated by a desire to promote the religious beliefs of certain board members and locally dominant religious groups.

The panel opinion also conflicts with the decisions of this Court by resting on the "facial neutrality" of the no-dancing rule without considering the underlying purposes of the School Board. Under the "sham purpose" doctrine, this Court has repeatedly held that the proper inquiry must extend beyond the "facial neutrality" of the challenged governmental action. *See Edwards v. Aguillard*, 482 U.S. 578, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 86 L. Ed. 2d 29, 105 S. Ct. 2497 (1985); *see also Lynch v. Donnelly*, 465 U.S. 668, 694, 79 L. Ed. 2d 604, 623, 104 S. Ct. 1355 (1984) (O'Connor, J.,

concurring) ("every governmental practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion"). As the trial court found, *everybody* in Purdy (including the members of the School Board) was keenly aware that the maintenance of the no-dancing rule was motivated by a desire to endorse and promote fundamentalist religious beliefs as official school policy. The "facial neutrality" of the no-dancing rule cannot overcome the fact that the no-dancing rule was inherently religious to the Purdy School Board. *See* A-11.

Nor can the absence of evidence establishing the purpose of the rule when it was enacted a century ago justify its present day maintenance and enforcement. As Justice O'Connor has pointed out, the "history and ubiquity" of a challenged practice does not provide an artificial exception to Establishment Clause scrutiny; instead, it is relevant only because "it provides *part* of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *County of Allegheny v. ACLU*, 106 L. Ed. 2d 472, 519, 109 S. Ct. 1086 (O'Connor, J., concurring) (emphasis added).

This case focused on the actions of the Purdy School Board in 1986 when it not only denied a request for a school-sponsored dance but also blocked the otherwise permissible rental of school facilities for a parent-chaperoned dance. The board's actions were directly contrary to the professional judgment of the school district superintendent, Dr. Richard Place, and the views of at

least three board members that the rule should be rescinded because school dances are an appropriate extracurricular activity for teenagers. As a matter of overwhelming proof, those secular views were ignored and the rule was retained and enforced in a conscious effort to endorse and promote the fundamentalist religious belief that social dancing is sinful. In light of this evidence, and the trial court's undisturbed credibility findings, the maintenance of the rule did not "merely coincide" with local religious beliefs; rather, the maintenance of the rule was a direct and purposeful endorsement of those religious beliefs.

It also is beyond dispute that the Purdy School Board's maintenance of the no-dancing rule was widely perceived as a powerful endorsement by the public school system of fundamentalist religious beliefs. Under these circumstances, the panel's unanalyzed conclusion that the no-dancing rule did not have the "primary effect" of advancing religion must be reexamined. As the district court noted, "[t]he public stamp of approval cannot be placed on one faith – even if it is the majority in a particular school system." A-14, A-15. Simply put, the board's actions ran afoul of the Establishment Clause which, "at the very least, prohibits government from *appearing to take* a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3101, 106 L.

Ed. 2d 472, 495 (1989) (citation omitted) (emphasis added).[2]

The inescapable fact remains that, within the Purdy community, the School Board's maintenance of the no-dancing rule is widely viewed as a symbol of official governmental endorsement for fundamentalist religious beliefs. Although there is no physical manifestation of the rule, such as a creche or a cross, the effect on the community is no less powerful. *Compare County of Allegheny v. ACLU*, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (creche display violated Establishment Clause because it conveyed message of governmental endorsement for Christianity), *with Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 86 L. Ed. 2d 557, 105 S. Ct. 2914 (1985) ("primary effect" violation where legislation conveyed message of endorsement of a particular religious belief); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 74 L. Ed. 2d 297, 103 S. Ct. 505 (1982) ("primary effect" violation where legislation created appearance of delegation of governmental power to churches). Chief Judge Lay instantly recognized this in his opinion dissenting from the denial of rehearing:

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[2] It should be noted that the Court's language in *County of Allegheny* emphasizes the prohibition against governmental action which creates an "appearance" of taking a position on religious beliefs without any corresponding secular justification. The panel's modified quotation from *County of Allegheny*, which speaks only of whether government has "take[n] a position," plainly overlooks the importance of "appearances" in "primary effect" analysis. *See* A-23. Indeed, the "appearance" of promoting religion is the very focus of this prong of the *Lemon* test. *See Lynch v. Donnelly*, 465 U.S. 668, 690, 79 L. Ed. 2d 604, 621, 104 S. Ct. 1355 (1984) (O'Connor, J., concurring).

> As a symbol of religious endorsement, the rule is no less obvious than a monument anchored to the schoolhouse lawn pronouncing: "THIS SCHOOL ADHERES TO THE BASIC TENETS OF THE MINISTERIAL ALLIANCE CHURCHES." A-36, A-37.

The panel's blunt ruling that the religious effect of the rule is "indirect, remote and incidental" directly conflicts with the factual findings of the district court and with this Court's admonition that the religious effect of a challenged governmental practice must be judged in its unique factual context. *County of Allegheny*, 106 L. Ed. 2d at 496, 109 S. Ct. at 3103; *Wallace*, 472 U.S. at 74, 86 L. Ed. 2d at 54-55 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 694, 79 L. Ed. 2d at 623 (O'Connor, J., concurring). Judge Clark, who heard the evidence over four days of trial and who lives in the strongly fundamentalist Southwest Missouri area, was fully aware of the symbolic importance of the no-dancing rule and its impact on members of minority faiths. Giving proper deference to the district court's factual findings, particularly his credibility findings, it is plainly evident that the actual purpose and primary effect of the no-dancing rule – indeed, the sole purpose and effect of the rule – is the promotion of religious dogma as official governmental policy. The panel opinion's unanalyzed conclusions to the contrary are squarely in conflict with the decisions of this Court.

B. This Case Presents a Critical Challenge to This Court's Establishment Clause Jurisprudence

If the panel opinion stands unreviewed, the precedent thereby created will carry grave constitutional

implications for the Nation as a whole. As Chief Judge Lay wrote in his dissent from the denial of rehearing:

> I dissent from the denial of the suggestion for rehearing en banc. I do so not only because the panel's decision is wrong; I do so because of the unwarranted precedent created in this circuit and throughout the nation providing a devious springboard for further destruction of the wall separating church and state. A-39.

Contrary to the Establishment Clause precedents handed down by this Court, the panel decision cavalierly disregards the "sham purpose" doctrine and refuses to consider the factual context of the challenged practice. Even more dangerous is the panel's identification of "facial neutrality" as a concept which immunizes otherwise objectionable governmental conduct. Under the panel's analysis, this Court's decisions in *Edwards*, *Wallace*, and *Epperson* would be stripped of their precedential importance.

The Establishment Clause stands as our country's most important means of preventing religious tyranny and guaranteeing individual freedom of belief. The constitutional separation of church and state is particularly important in the public school setting, a venue which this Court historically has guarded with special vigilance:

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools.

Edwards v. Aguillard, 482 U.S. 578, 584, 96 L. Ed. 2d 510, 519, 107 S. Ct. 2573 (1987).[3] This case challenges this Court to indicate whether it will reaffirm or retreat from the vigilance promised in *Edwards*, *Wallace*, and *Epperson*. The stakes must not be underestimated, for nothing less is involved than the freedom of thought and belief of the students and parents of the Purdy R-2 School District. As Judge John Gibson succinctly put it in his dissent from the denial of rehearing:

> This is a case about religious tyranny. . . .In the overall scheme of things, a dance at Purdy high school, with an enrollment of 519, may not be of earth-shattering significance. Yet, our Constitution protects *all* citizens, including the students at Purdy high school, from religious, as well as political, oppression by a majority. The first amendment rights of those students sound a call that this court should not ignore. A-35.

Because the panel decision conflicts with settled Establishment Clause jurisprudence and threatens the

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[3] In view of this special vigilance, it comes as no surprise that every public school case decided by this Court in the last thirty years has resulted in a ruling that the challenged governmental action violated the Establishment Clause. *See Edwards v. Aguillard*, 482 U.S. 578, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985); *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980); *Epperson v. Arkansas*, 393 U.S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963); *Engel v. Vitale*, 370 U.S. 421, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962). Significantly, the panel opinion does not mention and fails to apply this special vigilance.

foundation of the separation of church and state, certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Jonathan CLAYTON, a minor by Connie CLAYTON his next friend; Steve Blakley, a minor by Tressia Blakley his next friend; David Mareth, a minor by Marilyn Mareth his next friend; Mark Flummerfelt, a minor by Carolyn Flummerfelt his next friend; Michael Beagle, a minor by James M. Beagle his next friend; George Fox, a minor by Joan Fox his next friend; Amy Dianne Wolf, a minor by Frances Ann Wolf her next friend, Anna Svetlecic, a minor by Vicki Svetlecic her next friend, Connie Clayton, Tressia Blakley, Vicki Svetlecic, Walter Welch, Sherry Welch, Robert Mareth, Marilyn Mareth, Michael Flummerfelt, Carolyn Flummerfelt, Frances Ann Wolf, Joan Fox, Howard Fox, Jr. and James M. Beagle, Plaintiffs.

v.

Richard M. PLACE, Glen Garrett, Rex Henderson, Allen Keeling, Art Negre, Jacqueline Stephens, and Jim Terry, all in their individual and official capacities, and Purdy R-II School District, Defendants.

No. 86-5184-CV-SW-4.

United States District Court,
W.D. Missouri.
Southwestern Division.

Aug. 1, 1988.

ORDER

RUSSELL G. CLARK, District Judge.

Plaintiffs, school children, parents and taxpayers of the Purdy R-II School District bring this action against the defendants, the school board and school superintendent of Purdy R-II School District alleging a violation of the First Amendment of the United States Constitution. The

plaintiffs allege that Policy Rule 502.29 of the Purdy R-II School District endorses or advances the "no dance" religious beliefs of the Purdy community and thus violates the Establishment Clause of the First Amendment. Defendants deny that Rule 502.29 has any religious significance, but rather argue that it is merely a reflection of the Purdy community's "cultural conservatism." This case was tried to the Court without a jury from June 27, 1988 through June 30, 1988.

The issue before this Court is not (as defendants contend) whether the Purdy School District must sponsor social dances, nor is it the responsibility or perogative of this Court (as plaintiffs contend) to mandate how many, if any, or when school dances are to be held. The issue is simply whether the rule which prohibits school dances in the Purdy school system is an impermissible establishment of religion. For the following reasons, the Court finds that Rule 502.29 of the Purdy R-II School District violates the United States Constitution, specifically, the Establishment Clause of the First Amendment.

Pursuant to Rule 52, Fed.R.Civ.P., the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiffs Jonathan Clayton, Michael Beagle, George Fox and Amy Diane Wolf are 1988 graduates of Purdy R-II High School.

2. Plaintiffs Steve Blakley, Mark Flummerfelt and Anna Svetlecic are currently enrolled in Purdy R-II High School.

3. Plaintiffs Connie Clayton, Tressia Blakley, Vickie Svetlecic, Walter Welch, Sherri Welch, Robert Mareth, Marlene Mareth, Michael Flummerfelt, Carolyn Flummerfelt, Francis Ann Wolf, Joan Fox, Howard Fox, Jr., and James M. Beagle are parents of children who have attended, are attending, or in the near future will attend Purdy R-II High School. Each of these plaintiffs also is a taxpayer in the Purdy R-II School District.

4. Defendant Richard M. Place is the former superintendent of the Purdy R-II School District.

5. Defendant Sheldon Buxton is the present superintendent of the Purdy R-II School District.

6. Defendants Glen Garrett, Rex Henderson, Allen Keeling, Art Negre, and Jim Terry currently are and, since at least 1985, have been members of the Board of Education of the Purdy R-II School District.

7. Defendant Launce Bunnell currently is a member of the Purdy R-II Board of Education.

8. Defendant Jacqueline Stephens was a member of the Board of Education of the Purdy R-II School District during 1986, but is not currently on the Board.

9. Each of the plaintiffs in this case are residents of the Purdy R-II School District, Barry County, Missouri, within the Southwestern Division of the United States District Court for the Western District of Missouri.

10. Defendant Purdy R-II School District is a duly constituted school district under the laws of the State of Missouri, and is located in the County of Barry, State of Missouri. Defendant School District offers education to children in grade levels kindergarten through twelve at

facilities located within the corporate limits of the City of Purdy, Missouri.

11. Each of the individual defendants were residents of Barry County, Missouri at the time of the filing of this lawsuit.

12. Defendant School District's Policy 502.29 states:

> *Secret Organizations – School Dances.* No fraternities, sororities, secret societies, or organizations shall be permitted, nor shall any student organization be permitted to elect its [sic] own membership. School dances are not authorized and school premises shall not be used for purposes of conducting a dance.

13. At the January 9, 1978 school board meeting, student council representatives and class representatives requested permission to allow school dances to be held at school. The School Board voted the request down by 4-2.

14. Board member Jim Terry voted to allow dancing. Jim Terry was defeated in the next school board election.

15. In October 1984, Purdy students Ed Mareth, Kevin Keeling and Eddie Ray contacted Superintendent Place to request permission to have a homecoming school dance. Superintendent Place, who was and is in favor of the school dances, contacted the board members to get their views.

16. Board president Garrett thought it might be time to try it, but stated that the last time the dance issue was brought up it generated a lot of heat. Board member Terry said he would favor changing the rule unless the change generated a lot of controversy. Board member Stevens was in favor of changing the rule.

17. Board member Keeling opposed changing the rule stating that he may be considered a hypocrite for allowing his children to dance, but he sincerely believed that most people did not want the rule changed. Board member Henderson's views were similar to Keeling's views. Board member Negre was also concerned about community support and possible school chaperoning. No formal request was made to the school board at that time and the board took no action.

18. During the 1985-86 school year, another group of students and parents sought to change Rule 502.29. At a January meeting with Superintendent Place, when questioned by the parents about the reasons for the prohibition, Superintendent Place stated words to the effect "why should this surprise you, this is a conservative, religious community." When asked if it were the Baptists that opposed dancing, Superintendent Place stated, "Let's just say protestants."

19. Prior to the February meeting, Board member Keeling told Caroline Plummerfelt that he opposed changing the rule because his church preached that it was wrong and immoral to dance.

20. At the February 10, 1986 school board meeting, plaintiffs Connie Clayton, Tressia Blakley, Marlene Mareth, Carolyn Flummerfelt, James Beagle, Joan Fox, Robert Mareth and Michael Flummerfelt appeared to request a reconsideration of Rule 502.29 in order to sponsor dance by the newly formed SADD (Students Against Drunk Driving) chapter. At the meeting the school board members discussed all of the telephone calls they had been receiving concerning the dance issue. The board members

now state the callers gave no reasons for maintaining the rule. Reverend Ted Davis and his wife were present at the meeting to state their opposition to a change in the rule. When Reverend Davis was asked for his reasons, board president Garrett stated that he did not have to tell anyone his reasons. Garrett stated "you'd better hope there's never separation of God and school" in response to a question about the separation of church and state. Rev. Davis then asked for time to respond to the rule change at the next school board meeting.

21. When school board member Terry was contacted by plaintiff Fox, he stated that he had voted for dance in the past but caught so much "flak" from the ministers that he would vote against it this time. School board member Keeling stated to Fox that he did not believe in dancing because he was taught it was wrong.

22. Board member Keeling told plaintiff Marlene Mareth that his background disfavored dancing; board member Negre stated his church is opposed to dancing.

23. After the February meeting the Ministerial Alliance met to plan the opposition to changing the rule. The group consists of ministers from the First Baptist, the First Christian, the First Free Will Baptist, the First Assembly of God, and the Macedonia Baptist Churches. There are no Catholic, Lutheran, Presbyterian, Methodist, Jewish or Mormon members in the Ministerial Alliance. The members agreed to "get" their church members to attend the March school board meeting to oppose a change in the rule.

24. The First Baptist Church minister, Rev. Winfrey, spoke to his congregation about the upcoming dance

issue at the school board. He encouraged the congregation to attend the meeting and oppose the change in the rule to allow dancing. The church congregation has prayed for member Blakley's soul for trying to change the rule in the school.

25. To become a member of the First Assembly of God, a person must agree to be separate from worldliness – which includes dancing. The minister of that congregation, Rev. Dement testified that if a member of his congregation engaged in social dancing he would have no choice but to refer him/her to the Presbyters for counseling. He encouraged his congregation to attend the March meeting and made known his views against dancing.

26. Prior to the March meeting, the minister of the Free Will Baptist Church, Ted Davis, contacted every school board member except Stephens to voice his opposition to school dancing. Davis informed his church that there was a petition to be signed concerning dancing as they left the service the Sunday before the March meeting; he believes and preaches that social dancing is sinful, scripturally prohibited, and possibly satanic. He has discussed this view with church members, has preached against dancing from the pulpit and would have a private counseling session with a member of his congregation who engaged in social dancing.

27. The topic at Sunday school on the Sunday before the Board meeting at the Macedonia Free Will Baptist Church, was the change in the rule. Board member Henderson was present and stated that there would be no dancing as long as he was on the school board and encouraged everyone to go to the meeting to show their

opposition to any change in the rule. Later at the church service, Gary Pinnell rose and asked everyone to show their support for the rule. Rev. Neal, a member of the Ministerial Alliance, believes social dancing is inappropriate behavior, has discussed his beliefs with board members Henderson and Negre, and has "mentioned" his belief in church services.

28. The largest crowd ever attended the March 19, 1986 board meeting. At the meeting on the dance issue, a presentation was made by Joan Fox, Rev. Davis and Gary Pinnell. No direct mention was made of religion per se at the meeting; however, the letter from the Ministerial Alliance was read in its entirety. At the end of Rev. Davis' talk, he asked the 250-400 people in attendance to stand in opposition to changing the rule. The overwhelming majority of people stood in opposition to changing the rule. Later in closed session, the Board did not take a formal vote, but left the rule intact.

29. Prior to April 1986, the school premises were rented for various nonschool functions except on Wednesday and Sunday evenings. Wednesday and Sunday are traditional church nights. On April 18, 1986, plaintiff Carolyn Flummerfelt completed an application for the rental of the Purdy Elementary School for an end of the year dance. Superintendent Place referred the request to the school board. The board called a meeting on April 29, 1986 and with counsel present went into executive closed session. The board suspended their rental policy at that meeting. At a later meeting the board decided not to rent to any outside group – that the school buildings would be used for school purposes only. Since that time, the building and grounds have been used for

nonschool softball leagues, pick-up basketball games and an exhibition donkey basketball game.

30. In the past twelve years a "banquet" has been held for juniors and seniors with teachers and chaperones. The place of the banquet has varied, but has often been held on school property. The "prom" is then held off the school grounds (often in neighboring towns) without teacher participation or school funding. A breakfast is often held around 1:00 or 2:00 a.m. at the school. If the "banquet" is held off-campus, teachers chaperone off-campus; the banquet has been held several times in Springfield, which is approximately 60 miles from Purdy.

CONCLUSIONS OF LAW

Initially, the Court notes the allegation by defendants that the claims of the Purdy R-II High School graduates are moot is without merit. Those students have a claim for nominal damages, attorney's fees and costs which may proceed. Defendants' motion to dismiss Jonathan Clayton, Michael Beagle, George Fox, and Amy Dianne Wolf will be denied. Defendants' motion for partial summary judgment (on Counts II and III) will be denied. It is not necessary to rule on the summary judgment motion in view of the finding in plaintiff's favor on Count I. The Court finds that Robert Mareth, Marlene Mareth and James Beagle do have citizen standing to challenge an establishment clause claim. Furthermore, whether any particular plaintiff has standing does not affect the outcome of this decision.

The Supreme Court has consistently used a three-part test in analyzing whether there is a violation of the establishment clause of the First Amendment to the United States Constitution. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, and third the statute must not foster excessive governmental entanglement with religion. *Id.* at 612-13, 91 S.Ct. at 2111. Excessive entanglement has been further defined as either excessive administrative entanglement or excessive political divisiveness. *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 1365, 79 L.Ed.2d 604 (1984). The Supreme Court has not held excessive political divisiveness alone to invalidate otherwise permissible conduct. *Id.*

Lemon's purpose requirement aims at preventing the relevant governmental decisionmaker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, ___ U.S. ___, 107 S.Ct. 2862, 2868, 97 L.Ed.2d 273 (1987). Defendants argue that dancing in this case is not a religious issue. That assertion has no basis in the evidence presented to this Court.

The Court regards the following statements of the board members as unpersuasive; that no one has ever stated to them that they oppose dancing in the schools for religious reasons; that they have no idea why the community is opposed to dancing in the school; that there was no religious pressure to keep the rule; and that the rental policy was changed in response to problems with liability

of the schools. Particularly incredible are board member Henderson's courtroom statements that his vote did not reflect his personal religious feeling nor religious beliefs of the community and his statement that there was no religious significance to the entire hour discussion at Sunday school on the dance issue prior to the March meeting. Likewise, board member Terry's denial of any pressure for church members or ministers and his courtroom statements about no church influence is not believable in view of the contradictory testimony of the subpoenaed Sell, plaintiffs Flummerfelt and Fox, and defendant Place. Board member Negre's denial of ever hearing religious reasons espoused for not changing the rule is contradicted by his own minister's statement. While it is true that a secular approach may coincide with an approach taken by certain religions and not be inherently religious, the Court finds that the rule prohibiting dancing is inherently religious to the Purdy R-II School Board.

The entire board candidly admits that they followed the will of the majority; but they were not candid in their opinions on the religious reasoning of the majority . The board members were not particularly credible, either in demeanor or in the substance of their testimony. As stated above, it is inconceivable that no one in the Purdy area has ever expressed the view, within the board members' hearing, that dancing is either immoral, sinful or against any religion. It is inconceivable that certain board members were totally unaware that dancing was against the tenets of some Purdy residents' religion. It is equally unbelievable that the board placed no religious significance to a statement given by the ministerial alliance, a

group of ministers whose combined ministry included some of the board members. This Court is skeptical that it heard the complete story concerning the board members' deliberations of the rule and the religious significance of the opposition to dancing in Purdy. The school board adopted the reasoning of the "majority" of townspeople, including the strongly-held religious views.

Furthermore, the board's courtroom statements that they accepted the minister's statements at face value defy reality. It is unbelievable that 300-400 people came to the school board meeting to protest the added expense of 1 or 2 dances or the increased responsibility to teachers. The teachers already must chaperone the banquet but leave when the dancing begins. It is particularly significant that no facts were requested of the opponents of the rule to ascertain whether there would be any increased costs or responsibilities. The record is devoid of any indication that the board investigated the reasons propounded by the opponents, despite the fact that the school's superintendent favored rescinding the rule and stated that he could handle any chaperoning problems.

Condemnation of dancing is not firmly rooted in Judeo-Christian moral or ethical standards. Allowing students to engage in dancing within the school building does not conflict with our historical traditions. See, *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986); *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983); *Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir.1980), *cert. denied* 449 U.S. 987, 101 S.Ct. 409, 66 L.Ed.2d 251 (1981). Although the intent of the decisionmakers who promulgated the rule cannot be ascertained, the school board in

keeping the rule abandoned neutrality with the intent to promote a particular view in religious matters.

Particularly significant to this Court is the fact that in April a group of parents wanted to rent the school facilities for a school dance. There would be no added cost to the school, no supervision by teachers and no classroom time attributed to extracurricular activities. Yet the school board called an emergency meeting to do away with the entire rental policy rather than allow dancing in the school. It is one thing to be opposed to the school itself sponsoring and paying for an extracurricular activity and quite another to prohibit social dancing on school property. It is clear to the Court that the reasons propounded by the majority were a mere pretext for the real religious reasoning. Thus, there is no valid secular purpose to having Rule 502.29.

Even if the defendants could show a valid secular purpose, the primary effect of this rule is to endorse the tenets of that particular religious group in Purdy who believe that social dancing is sinful. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 104 S.Ct. at 1367 (O'Connor J., concurring). "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community." *Lynch* at 1369 (O'Connor, J., concurring). In the present matter, the school board is

placing the state's imprimatur on one particular religious belief. The testimony at trial was that a tenet of the Purdy Assembly of God religion is a separation from worldliness, including dancing. The evidence was that a tenet of the Purdy Free Will Baptist Church is that social dancing is sinful by prohibiting dancing in the Purdy School, the school board has assumed the role of monitoring adherence to that particular tenet. The religion of every man must be left to his convictions and conscience and it is the right of every man to exercise his religion as his convictions and conscience may dictate. *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 2488 n.38, 86 L.Ed.2d 29 (1985). Church members or non-church members can no longer follow their own convictions and conscience; this religious decision has been made for them.

The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children of formative years. *School District of City of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985). That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. *Wallace*, 105 S.Ct. at 2492 n. 51 [quoting *Illinois, ex rel. McCollum v. Bd. of Education*, 333 U.S. 203, 227, 68 S.Ct. 461, 473, 92 L.Ed. 649 (1948) (Frankfurter, J., concurring)]. The right to dance may not be a tenet of the Methodist, Catholic, Lutheran or Mormon Church, but the children of these faiths cannot be made to feel that their religions are inferior because their churches do not prohibit (and in some cases, actually sponsor) dances. The public stamp of approval cannot be placed

on one faith – even if it is the majority in that particular school system. It is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment (citations omitted). *Stone v. Graham*, 449 U.S. 39, 42, 101 S.Ct. 192, 194, 66 L.Ed.2d 199 (1980). The administration of religious training is properly in the domain of the family and church. *Florey, supra* at 1318. The First Amendment prohibits public schools from serving that function. The primary effect of Rule 502.29 is to advance the religious beliefs of a particular religion.

The third prong set out in *Lynch* is whether there is excessive administrative or political entanglement. There is no question that the dance issue is deeply divisive in the Purdy area, nor is there any question that it has been a divisive issue for many years. The elaborate steps the school system took to ensure that dancing would not occur included having a junior/senior banquet at the school with teacher chaperones, adjourning to separate facilities for dancers and non-dancers, and then a parent-sponsored breakfast at 1:00 or 2:00 a.m. Special steps were taken so that banquet decorations would not be used as dance decorations. Money raised by having a dance could not be used by the Purdy High School classes for the class trip. The excessive caution surrounding anything connected with dancing undermines any assertion of a secular purpose, but it also suggests the extreme divisiveness of this issue. Religious groups of course have an absolute right to make their views known and to participate in public discussion of issues. The ministers who participated in this public debate can in no way be criticized by the state for that participation; however, those views may not prevail if they conflict with the

constitutional mandate forbidding the establishment of a religion. Rule 502.29 of the Purdy R-II School District violates the Establishment Clause of the First Amendment to the Untied States Constitution because the prohibition against dancing in a public school has no secular purpose, advances the tenets of one group of religion, and is politically divisive.

It would be inappropriate for this Court to order the district to sponsor school dances; however, a district rule prohibiting students from holding dances on school property infringes on the First Amendment rights of the students and must be invalidated. Accordingly, it is

ORDERED that School Board Policy Rule 502.29 of the Purdy R-II School District is unconstitutional; and it is further

ORDERED that the School Board is enjoined from enforcing Rule 502.29; and it is further

ORDERED that plaintiffs are awarded nominal damages in the amount of $1.00 to each of them plus reasonable attorney's fees; and it is further

ORDERED that the Clerk shall refrain from entering final judgment until a hearing can be held on attorney's fees; and it is further

ORDERED that a hearing on the attorney's fees issue is set for Friday, September 2, 1988 at 9:00 a.m.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2493

Jonathan Clayton, a minor, by Connie Clayton, his next friend; Steve Blakley, a minor, by Tressia Blakley, his next friend; David Mareth, a minor, by Marlene Mareth, his next friend; Mark Flummerfelt, a minor, by Carolyn Flummerfelt, his next friend; Michael Beagle, a minor, by James M. Beagle, his next friend; George Fox, a minor, by Joan Fox, his next friend; Amy Dianne Wolf, a minor, by Frances Ann Wolf, her next friend Anna Svetlecic, a minor, by Vickie Svetlecic, her next friend; Connie Clayton; Tressia Blakley; Vickie Svetlecic; Walter Welch; Sherry Welch; Robert Mareth; Marlene Mareth; Michael Flummerfelt; Carolyn Flummerfelt; Frances Ann Wolf; Joan Fox; Howard Fox, Jr.; and James M. Beagle,	*	Appeal from the United States District Court for the Western District of Missouri.
Appellees,	*	
v.	*	

Richard M. Place; Glen Garrett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry; All in their individual and official capacities and Purdy R-2 School District,

Appellants.

Submitted: April 10, 1989
Filed: September 1, 1989

Before FAGG, Circuit Judge, FLOYD R. GIBSON, and TIMBERS,* Senior Circuit Judges.

FAGG, Circuit Judge.

Rule 502.29 of the Purdy R-2 School District provides in part: "School dances are not authorized[,] and school premises shall not be used for purposes of conducting a dance." Although the record does not indicate when the rule was enacted, the parties agree it has been in place for a long time. A group of students, parents, and taxpayers (collectively plaintiffs) brought this action against the Purdy R-2 School District, its Superintendent, and members of the District's Board of Education (collectively the District), seeking to set aside the no-dancing rule. Among other theories, plaintiffs asserted the rule violates the establishment clause of the first amendment because it

*The HONORABLE WILLIAM H. TIMBERS, Senior United States Circuit Judge for the United States Court of Appeals for the Second Circuit, sitting by designation.

advances the views of residents in the Purdy District who oppose dancing on religious grounds. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The district court agreed and invalidated the rule on that basis. *See Clayton v. Place*, 690 F. Supp. 850, 854-57 (W.D. Mo. 1988). The District now appeals, and we reverse.

Purdy is a small, primarily rural community in southwestern Missouri. The record indicates religion is an important force in Purdy, and particular churches are staunchly opposed to social dancing. A tenet of one denomination in Purdy specifically requires "a separation from worldliness, including dancing," *id.* at 856, and another teaches "social dancing is sinful," *id.* Over the years, various groups have unsuccessfully sought permission for school dances and have proposed changing the District's no-dancing rule. Despite their lack of success, however, Purdy students are not prohibited from holding dances away from school property, and they have regularly done so.

In February 1988, a group seeking reconsideration of rule 502.29 to enable a newly formed student organization to sponsor a dance at the high school appeared before the Board of Education (the Board). A local minister who opposed changing the rule attended the meeting and requested a place on the Board's March agenda to make a presentation on the subject. Following discussion, the Board deferred action on the issue until the March meeting.

In the interim, it is fair to say the Purdy religious community actively discussed the dancing issue. A group

of local ministers met to plan how to express their support for the rule. Ministers of several local churches, including some to which Board members belong, spoke out during church services against changing the rule and encouraged members of their congregations to attend the March Board meeting and show their opposition as well.

A large crowd gathered for the March Board meeting. Although "[n]o direct mention was made of religion per se at the meeting," *id.* at 853, the minister who had attended the February meeting spoke against changing the rule and read a letter from the ministerial group to the same effect. When the minister finished his presentation, he took the opportunity to ask those in the audience who opposed changing the no-dancing rule to stand. Of the estimated 250-400 people in attendance, an "overwhelming majority of people stood in opposition to changing the rule." *Id.*

The Board later went into closed session to discuss the students' reconsideration request. Although no formal vote was taken, the Board agreed unanimously to "le[ave] the rule intact." *Id.* Plaintiffs then brought this action, contending the rule violated: (1) the freedom of association clause of the first amendment; (2) the freedom of speech clause of the first amendment; (3) the establishment clause of the first amendment; and (4) article I, section 7 of the Missouri Constitution. The court rejected plaintiffs' freedom of association and speech challenges, but held that the rule violated the establishment clause of the federal constitution. In addition, the court held that for the same factual reasons given in connection with its establishment clause ruling, the District's no-dancing rule violated the Missouri Constitution. *See Clayton v. Place,*

No. 86-5184-CV-SW-4, slip op. at 1-2 (Aug. 30, 1988) (unpublished order); 690 F. Supp. at 851, 856. On appeal, the District challenges only the court's rulings pertaining to the establishment clause and to the Missouri Constitution.

In considering the district court's ruling that the Purdy no-dancing rule is invalid under *Lemon*, we review the court's findings of fact under the clearly erroneous standard. *See Carter v. Broadlawns Medical Center*, 857 F.2d 448, 453 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1569 (1989). The ultimate conclusion of the rule's constitutionality, however, is a mixed question of law and fact. *See id.* Although the record contains no indication of when or for what express purpose the rule was originally passed, that circumstance is no barrier to evaluating the rule's compliance with the establishment clause. *See Mueller v. Allen*, 463 U.S. 388, 395 n.4 (1983). The district court's opinion does not rest on any adverse factual findings bearing directly on the content of rule 502.29 or on the circumstances surrounding its original passage. Nevertheless, the plaintiffs have framed their action as one to set aside the rule, and we thus turn to examine the rule itself.

The Supreme Court has consistently followed the three-part *Lemon* test for determining whether a challenged governmental rule offends the establishment clause, and the parties agree the *Lemon* analysis applies in this case. Under the *Lemon* framework, a rule is permissible if it has a secular purpose; if it neither advances nor inhibits religion in its principal or primary effect; and if it does not foster an excessive entanglement with religion. *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3100 (1989). The challenged rule is valid only of it meets all three

tests. *See Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). The district court determined the Purdy no-dancing rule violated each of these three requirements and was thus invalid. We disagree as to each.

First, plaintiffs conceded at oral argument (and the district court acknowledged) that extracurricular dancing is a wholly secular activity. *See* 690 F. Supp. at 855 ("Condemnation of dancing is not firmly rooted in Judeo-Christian moral or ethical standards."). Further, the rule carries within its text absolutely no religious component, and there is no record evidence of any actual religious purpose connected with the rule's enactment or its textual requirements. *Compare Wallace v. Jaffree*, 472 U.S. 38, 56-57 (1985). In our view, the rule on its face thus satisfies the first prong of the *Lemon* analysis. *See Bowen v. Kendrick*, 108 S. Ct. 2562, 2570-71 (1988); *Mueller*, 463 U.S. at 394-95; *see also Florey v. Sioux Falls School Dist.*, 619 F.2d 1311, 1314-15 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

Second, the record does not fairly demonstrate that any religious doctrine is principally or primarily advanced by the Board's enforcement of the no-dancing rule. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) (*Amos*). No student is prohibited from engaging in or refraining from extracurricular dancing should they choose to do so. Any arguably religious effect of the rule is indirect, remote, and incidental. *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984); *see also Bowen*, 108 S. Ct. at 2573. To the extent plaintiffs contend the rule impermissibly endorses or conveys a message of governmental preference for a particular religious viewpoint concerning social dancing, *see County of Allegheny*, 109 S. Ct. at 3101;

Bowen, 108 S. Ct. at 1571, we find nothing in the rule to suggest the District has "take[n] a position on questions of religious belief or * * * 'ma[de] adherence to a religion relevant in any way to a person's standing in the political community.' " *County of Allegheny*, 109 S. Ct. at 3101 (quoted citation omitted).

Finally, there is no showing the rule fosters excessive government entanglement in religious affairs. If anything, the rule promotes less, rather than more, school involvement in what plaintiffs contend is a religiously significant activity. *See Amos*, 483 U.S. at 339. The district court based this portion of its decision on the conclusion that the dancing debate was deeply divisive in the Purdy community. *See* 690 F. Supp. at 856. Political divisiveness along religious lines, however, is not a proper consideration except in cases involving financial aid to parochial schools. *See Bowen*, 108 S. Ct. at 2578 & n.14; *Mueller*, 463 U.S. at 403 n.11; *Carter*, 857 F.2d at 456; *Florey*, 619 F.2d at 1318. For these reasons, we conclude the District's no-dancing rule on its face satisfies the controlling *Lemon* standards. We turn now to the core of plaintiffs' additional argument challenging the rule.

Plaintiffs contend Board members acted in accordance with the religious beliefs of a majority of patrons attending the March Board meeting and in conformity with their own faiths when they acted to retain the no-dancing rule. Based on this premise, plaintiffs argue the Board's action was religiously motivated and, consequently, should result in nullification of the rule as a violation of the establishment clause. We reject this argument.

Although the record does not indicate the religious affiliation of patrons who stood in support of the rule at the March meeting, the district court held the Board had "adopted the reasoning of the 'majority' of townspeople, including the[ir] strongly-held religious views," 690 F. Supp. at 855. The court then determined "the rule prohibiting dancing [was] inherently religious to the [Board]," and "there [was] no valid secular purpose to having [r]ule 502.29," *id.* For this reason, the court concluded the Board's action violated *Lemon*'s purpose requirement because the Board "in keeping the rule abandoned neutrality with the intent to promote a particular view in religious matters," *Id.* Utilizing what amounts to the same rationale, the district court also held the rule ran afoul of *Lemon*'s effect standard because it has "the primary effect of * * * endors[ing] the tenets of that particular religious group in Purdy who believe[s] that social dancing is sinful," *id.*; *see also id.* at 855-56.

Initially, we observe the district court found a number of the Board members had at some time expressed the view that their individual religious backgrounds favored the rule. *See id.* at 852-53. In addition, the court found that to the extent Board members testified moral, educational, or fiscal concerns, and not religion, influenced their decisions, their testimony was not credible. *See id.* at 854-55. While we have no occasion to disagree with these findings, we believe plaintiffs' and the district court's reliance on them in this case is misplaced.

We readily acknowledge that under the record in this case, the no-dancing rule may be characterized as compatible with the sincerely held religious beliefs of a vocal

segment of the Purdy community. The mere fact a governmental body takes action that coincides with the principles or desires of a particular religious group, however, does not transform the action into an impermissible establishment of religion. *See Bowen*, 108 S. Ct. at 2571 n.8; *Lynch*, 465 U.S. at 682; *Harris v. McRae*, 448 U.S 297, 319-20 (1980); *see also Webster v. Reproductive Health Servs.*, 109 S.Ct. 3040, 3082 (1989) (Stevens, J., concurring and dissenting).

We also find no support for the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action. *Cf. Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("It is unrealistic * * * to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process."). To make government action assailable solely on the grounds plaintiffs suggest would destabilize governmental action that is otherwise neutral. Indeed, the focus of *Lemon* is to avoid a haphazard approach "for determining whether a government practice violates the [e]stablishment [c]lause." *County of Allegheny*, 109 S. Ct. at 3100.

We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards. In addition to its unrealistic nature, this approach to constitutional analysis would have the effect of disenfranchising religious

groups when they succeed in influencing secular decisions. In this case, the district court recognized "[r]eligious groups * * * have an absolute right to make their views known and to participate in public discussion of issues," 690 F. Supp. at 856. Nevertheless, the court held "those views may not prevail," *id.*, even though these groups have long been legitimate participants in secular community debate, *see Bowen*, 108 S Ct. at 2573.

At bottom, the proper remedy for plaintiffs' disenchantment with a Board that refused to change a rule that is compatible with *Lemon* is found at the ballot box and not in the Constitution. Having carefully studied the applicable authorities, the record, and the parties' arguments, we hold the District's no-dancing rule is not an unconstitutional establishment of religion under the first amendment.

We now turn to plaintiffs' argument that the rule violates article I, section 7 of the Missouri Constitution. The district court treated the relevant state constitutional provision as coextensive with the federal establishment clause for purposes of plaintiffs' action, and we adopt that construction as well. *See Goodwin v. Circuit Court*, 741 F.2d 1087, 1089 (8th Cir.), *cert. denied*, 469 U.S. 1216 (1984) ("We normally defer to the district courts on questions of the law of their own states, and this principle applies to state constitutions * * *."). In view of our decision on the federal constitutional principles, we necessarily conclude the District's rule does not infringe the state constitutional section challenged here. Accordingly, we reverse the district court's ruling on this issue.

In sum, we reverse the district court's challenged rulings and remand the case for proceedings consistent with this opinion, including reconsideration of the court's order awarding attorneys fees and expenses.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2493

Jonathan Clayton, a minor, by Connie Clayton, his next friend; Steve Blakley, a minor, by Tressia Blakley, his next friend; David Mareth, a minor, by Marlene Mareth, his next friend; Mark Flummerfelt, a minor, by Carolyn Flummerfelt, his next friend; Michael Beagle, a minor, by James M. Beagle, his next friend; George Fox, a minor, by Joan Fox, his next friend; Amy Dianne Wolf, a minor, by Frances Ann Wolf, her next friend; Anna Svetlecic, a minor, by Vickie Svetlecic, her next friend; Connie Clayton; Tressia Blakley; Vickie Svetlecic; Walter Welch; Sherry Welch; Robert Mareth; Marlene Mareth; Michael Flummerfelt; Carolyn Flummerfelt; Frances Ann Wolf; Joan Fox; Howard Fox, Jr.; and James M. Beagle,

Appellees,

v.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc.

Richard M. Place; Glen Garrett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry; All in their individual and official capacities and Purdy R-2 School District,	* * * * * * * * * *
Appellants.	*

Filed: November 17, 1989

Before LAY, Chief Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges.

The suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of majority of active judges voting to rehear the case en banc. Chief Judge Lay, Judges McMillian, Arnold and John R. Gibson dissent from the denial of the suggestion for rehearing en banc.

The petition for rehearing is also denied.

JOHN R. GIBSON, Circuit Judge, with whom LAY, Chief Judge, McMILLIAN and ARNOLD, Circuit Judges, join, dissenting.

I respectfully dissent from the decision of a bare majority of this court to deny rehearing en banc in this case. The district court's findings of fact, *Clayton v. Place*, 690 F. Supp. 850, 851-56 (W.D. Mo. 1988), demonstrate overwhelmingly that the religious views of five churches in Purdy, Missouri, caused the school board to refuse to

change its rule prohibiting social dancing.[1] These findings compel the conclusion that the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has not been satisfied.

The opinion of the panel, *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989), properly recognizes that the district court's findings of fact are reviewed under the clearly erroneous standard, but the ultimate question of the rule's constitutionality is a mixed one of law and fact. There is no claim that any finding of fact is clearly erroneous.

It is true, as the panel opinion states, that the rule is facially secular; the text of the rule does not explicitly state that dancing is prohibited for religious reasons. While the origins of the rule are not described, the issues before us deal with the enforcement of the rule and the board's refusal to change it. The *Lemon* test cannot be circumvented by merely omitting from a rule any explicit statement of religious purpose. Rather, the first part of the *Lemon* test depends upon the government's "actual purpose" in making a decision. *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). Moreover, while courts are "normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Id.* at 586-87. In this case, as in *Aguillard*, the board has "identified no clear secular purpose" for continuing to enforce its rule. *Id.* at 585.[2] In

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[1] The Purdy School District's Policy 502.29 states: "School dances are not authorized and school premises shall not be used for purposes of conducting a dance."

[2] The panel opinion states that the extracurricular dancing in this case is wholly secular. The true issue in the case, however, is whether the "no dance" rule has a secular purpose.

contrast, the findings of the district court make abundantly clear that adherence to the rule does have a clear religious purpose. *Cf. id.* at 587-93 (examining the legislative history of an act to determine whether it was motivated by a religious purpose); *id.* at 597-602 (Powell, J., and O'Connor, J., concurring) (same); *Wallace v. Jaffree*, 472 U.S. 38, 56-57 (1985) (same). The panel's conclusions in applying the *Lemon* test fail to give proper consideration to the findings of the district court, which must be set out in some detail.

During 1985-86, the parents and students involved in this litigation sought to change the "no dance" policy. The parents first asked Richard Place, the Superintendent of Schools, why dances were prohibited. Place answered that it was because Purdy was a conservative, religious community. They then asked if the rule was in effect because the Baptists opposed dancing, and Place answered, "Let's just say protestants." Prior to the school board meeting at which the proposal to permit dances was discussed, board member Keeling stated that he opposed changing the rule because his church preached that it was wrong and immoral to dance. Board member Terry told one of the plaintiffs that he had voted to permit dances in the past but caught so much "flak" from the ministers that he would vote against it this time. Board member Negre also declared that his church was opposed to dancing. At the February 10, 1986, meeting when the request to permit dances was initially made, Reverend Davis of the Free Will Baptist Church and his wife were present to state their opposition to a change in the rule. After Reverend Davis spoke, someone asked board president Garrett about the separation of church

and state. Garrett responded that, "you'd better hope there's never separation of God and school." *Clayton*, 690 F. Supp. at 852.

After the meeting, the Ministerial Alliance, composed of ministers from the First Baptist, the First Assembly of God, the First Free Will Baptist, the Macedonia Free Will Baptist, and the First Christian Churches,[3] met to plan the opposition to changing the rule. The ministers agreed to persuade their members to attend the March meeting to fight the proposed change in the rule.

The minister of the First Baptist Church spoke to his congregation about the dance issue, and encouraged them to attend the meeting and fight the proposed change. In addition, his congregation prayed for board member Blakely's soul because he tried to change the rule. *Id.* at 853.

The minister of the First Assembly of God Church testified that he would refer any member of his congregation who engaged in dancing to the Presbyters of the church for counseling. He also encouraged the congregation to attend the March meeting and reminded them of the church's position on dancing. To become a member of the First Assembly of God Church, a person must agree to be separate from worldliness, which includes dancing.

The minister of the Free Will Baptist Church believes and preaches that dancing is sinful, prohibited by scripture, and possibly satanic. He has preached against dancing from the pulpit and has had a private counseling

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[3] The district court noted that there were no Catholic, Lutheran, Presbyterian, Methodist, Jewish or Mormon members in the Ministerial Alliance. *Clayton*, 690 F. Supp. at 853.

session with any member of his congregation who engaged in dancing. Before the board met to consider the proposed change, he contacted all but one of the members to voice his opposition to school dancing. He also informed his church members that there would be a petition for them to sign to indicate their opposition to the proposed change.

The Sunday before the board meeting, the congregation of Macedonia Free Will Baptist Church discussed the rule and board member Henderson was present at the discussion. Henderson promised that there would be no dancing at the schools as long as he was on the school board, and he encouraged everyone to go to the meeting to show their opposition to any change in the rule. The minister of the church, who has said during church services that he believes dancing is inappropriate behavior, also discussed his beliefs with board members Henderson and Negre.

There were 250 to 400 people in attendance at the March 10, 1986 board meeting. When the ban on dances was discussed, no direct mention of religion was made, but a letter from the Ministerial Alliance was read in its entirety. Reverend Davis of the Free Will Baptist Church argued that the "no dance" rule should not be changed. As he concluded, he asked the people in the crowd to signify their opposition to changing the rule by standing. The overwhelming majority of people stood in opposition to the proposed change in the rule. The board later held a closed session. While the board did not take a formal vote, it left the rule intact.

On April 18, 1986, one of the parents requested permission to rent the elementary school building for a school dance. Prior to that date, the school premises had been rented for various nonschool functions. At the April 29th meeting, however, the board voted in favor of suspending its rental policy.[4]

The district court, in applying the Lemon test to these facts,[5] found unpersuasive the testimony of the board members that they had opposed dancing in the schools for secular reasons, that there was no religious pressure to keep the rule, and that the rental policy was changed in response to problems with the liability of the school.[6] The district court then found that the rule prohibiting dancing was "inherently religious to the [Purdy] School Board." *Clayton*, 690 F. Supp. at 855. It singled out the elimination of the rental policy and found that the board's purported reasons for the action were a mere pretext for the real religious justification.

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[4] At a later meeting, the board adopted a policy of not renting to any outside group and not using school buildings for other than school purposes. Since that time, however, the building and grounds have been used for nonschool softball leagues, pick-up basketball games, and an exhibition donkey basketball game.

[5] The district court's conclusions of law discuss not only legal issues but also contain an assessment of the credibility of board members' statements which are, I think, findings of fact, and they will be treated as such. *Clayton*, 690 F. Supp. at 854-55.

[6] The record does not reveal why dancing poses greater liability problems than does donkey basketball. *See supra* note 4.

The findings of the district court, eloquent in their simplicity, compel its conclusion, and support mine, that the school board was motivated by religious purposes. Strictly speaking, this conclusion renders unnecessary a consideration of the second and third components of the *Lemon* test. *Aguillard*, 482 U.S. at 585; *Wallace*, 472 U.S. at 56. These findings, however, also convincingly demonstrate that the principal, or primary, effect of the board's actions was to advance the religious views of some members of the community, and that the retention and enforcement of the rule constituted excessive government entanglement with these religious views. Therefore, I conclude that the second and third components of the *Lemon* test are also not satisfied.

This is a case about religious tyranny. The members of five churches who have strong views on the religious significance of dancing successfully exerted pressure on the board to prohibit school dances. In the overall scheme of things, a dance at Purdy high school, with an enrollment of 519,[7] may not be of earth-shattering significance. Yet, our Constitution protects *all* citizens, including the students at Purdy high school, from religious, as well as political, oppression by a majority. The first amendment rights of those students sound a call that this court should not ignore. Our denial of the petition for rehearing en banc turns a deaf ear to the pleas of those students.

LAY, Chief Judge, with whom McMILLIAN and ARNOLD, Circuit Judges, join, dissenting.

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[7] *137th Report of the Public Schools of Missouri* 103 (1986).

Judge John R. Gibson's illuminating dissent should leave little doubt that the record demonstrates the Purdy school board's action focuses upon religion. The trial court's findings should be upheld under the clearly erroneous rule. I write separately to underscore my disagreement with the panel decision, and to elaborate on the no-dancing rule's failure to pass scrutiny under the "effects" component of the framework enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The second prong of the *Lemon* test considers whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices." *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3103 (1989) (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)). "[T]he prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*.' " 109 S. Ct. at 3101 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment)) (emphasis in original).

The question, therefore, is "what viewers may fairly understand to be the purpose" of the no-dancing rule. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). To the residents of Purdy – especially the students of Purdy R-II High School – the rule's message is unmistakably clear: the school district promotes the tenets of the local religious community. As a symbol of religious endorsement, the rule is no less obvious than a

monument anchored to the schoolhouse lawn pronouncing: "THIS SCHOOL ADHERES TO THE BASIC TENETS OF THE MINISTERIAL ALLIANCE CHURCHES."

The message is not diluted, as the panel opinion suggests, by the fact that the school does not coerce students into refraining from dance away from school grounds. The Supreme Court has clearly held that proof of coercion is not a necessary element of any claim under the Establishment Clause. *County of Allegheny*, 109 S. Ct. at 3103 n.47; *Committee for Pub. Educ. v. Nyguist*, 413 U.S. 756, 2786 (1973). Indeed, the Court's recent decisions invalidating government action on Establishment Clause grounds have involved no direct coercion. *See, e.g., County of Allegheny*, 109 S. Ct. at 3086 (nativity display); *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989) (sales tax exemption for religious periodicals); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (rule limiting teaching evolution in school); *Ball*, 473 U.S. at 373 (state-sponsored educational programs at nonpublic schools); *Wallace*, 472 U.S. at 38 (moment of silence); *Stone v. Granam*, 449 U.S. 39 (1980) (posting Ten Commandments on classroom walls); *Nyguist*, 413 U.S. at 756 (tuition reimbursement to parochial school parents). It is enough that the government clearly endorses religion or particular religious beliefs, for endorsement itself "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring); *see also County of Allegheny*, 109 S. Ct. at 3101. This message is particularly potent in the educational context. "The government's activities in this area can

have a magnified impact on impressionable young minds,* * *." *Ball*, 473 U.S. at 383; *see also Clayton v. Place*, 690 F.Supp. 850, 856 (W.D. Mo. 1988).

Perhaps the no-dancing rule's symbolic effect would be less potent if the rule could be explained, at least in part, by some plausible secular purpose. Although it is clear that identification of a secular purpose will not immunize governmental action from scrutiny under *Lemon's* effects test, *see, e.g., Nyguist*, 413 U.S. at 774, it might at least help mask the appearance that the action is crafted as a religious endorsement. If, for instance, the District maintained the no-dancing rule in order to avoid such problems as noise, building destruction, or shortage of supervisory personnel, the community members and students might well see it in a somewhat different light. Yet, as Judge Gibson aptly points out, no nonreligious purpose can be discerned here.

In Purdy, Missouri, the no-dancing rule differs little from a school's posting of the Ten Commandments on its classroom walls. *See Stone*, 449 U.S. at 39. In both cases the school makes it abundantly clear to the students that it embraces the tenets of a particular religion. The panel implies that a difference lies in the fact the Ten Commandments are religious on their face whereas the no-dancing rule is facially nonreligious. *See Clayton v. Place*, 884 F.2d 376, 379 (8th Cir. 1989). This distinction, however, fails to give due regard to the religious environment that provides the no-dancing rule its lifeblood: a small town in which five churches wielding political influence teach that social dancing is sinful. Only in this context can the effect of the rule be judged. *See, e.g., County of Allegheny*, 109 S. Ct. at 3103.

If the Establishment Clause carries any significant meaning, it is that government cannot maintain a practice that has as its sole purpose and primary effect the advancement of a tenet unique to particular religious groups. I dissent from the denial of the suggestion for rehearing en banc. I do so not only because the panel's decision is wrong; I do so because of the unwarranted precedent created in this circuit and throughout the nation providing a devious springboard for further destruction of the wall separating church and state.

A true copy.

Attest: /s/ Robert D. St. Vrain

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

No. 89-1348

Supreme Court, U.S.
FILED
MAR 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

JONATHAN CLAYTON, a minor, by CONNIE CLAYTON, his next friend; Steve Blakley, a minor, by Tressia Blakley, his next friend; David Mareth, a minor, by Marlene Mareth, his next friend; Mark Flummerfelt, a minor by Carolyn Flummerfelt, his next friend; Michael Beagle, a minor, by James Beagle, his next friend; George Fox, a minor, by Joan Fox, his next friend; Amy Dianne Wolf, a minor, by Frances Ann Wolf, her next friend; Anna Svetlecic, a minor, by Vickie Svetlecic, her next friend; Connie Clayton; Tressia Blakley; Vickie Svetlecic; Walter Welch; Sherry Welch; Robert Mareth; Marlene Mareth; Michael Flummerfelt; Carolyn Flummerfelt; Frances Ann Wolf; Joan Fox; Howard Fox, Jr.; and James M. Beagle,

Petitioners,

vs.

RICHARD M. PLACE; Glen Garrett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry, all in their individual and official capacities; and Purdy R-2 School District,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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341

QUESTIONS PRESENTED

1. Because all of the student-Petitioners have graduated or are no longer enrolled in the School District, is this case now moot and the Court without jurisdiction?

2. Was the Eighth Circuit correct in holding that when a law merely coincides with the principles or desires of a particular religious group, such evidence is not probative on the question of legislative purpose?

3. Was the Eighth Circuit correct in holding that evidence of activities by local citizens, including ministers, in support of a school policy was not probative on the question of legislative purpose because:

(a) the focus should be on the School Board, which realistically cannot be accountable for the motives of its multifarious constituents; and

(b) in any event, these activities of speech and political participation are themselves protected by the First Amendment?

4. Was the Eighth Circuit correct in holding that evidence of the individual religious background and personal beliefs of an elected public official cannot be probative on the question of legislative purpose because:

(a) to make legislation assailable on this basis "would destabilize governmental action that is otherwise neutral" (A-25); and

(b) elected government officials are not "required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable"? (A-25).

QUESTIONS PRESENTED – Continued

5. Was the Eighth Circuit correct in holding that a school policy has no principal or primary effect that advances or endorses religion because:

(a) the text of the policy is facially neutral;

(b) the subject matter of the policy concerns a wholly secular activity;

(c) there was no evidence in the legislative history that the policy was originally motivated by religion; and

(d) the policy operates in the "negative," in that it does not expose students to unwanted exercises or cause them to assume special burdens to avoid its reach, but only omits one activity from among the school's many extracurricular offerings?

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PROCEEDINGS IN THE COURTS BELOW

In December 1986, Plaintiffs-Petitioners sued the Purdy R-2 School District and Board of Education members complaining of School District Policy 502.29. While Petitioners now convey the impression that their cause has been solely about religion, that was not initially the case. In addition to alleging that the Policy violated the Establishment Clause (Count I) and Article I, Sections 6 and 7 of the Missouri Constitution (Count IV), Plaintiffs further alleged a denial of the Free Speech Clause (Count III) and the right to Freedom of Association (Count II).

The case was tried on June 27-30, 1988, on all four counts. On August 1, 1988, the trial court issued an interlocutory Order wherein it concluded that the Policy constituted an establishment of religion. On August 30, 1988, in response to the School District's motion requesting a ruling on the remaining counts, the trial court issued a second interlocutory Order, which held that the School District had not violated Plaintiffs' free speech and association rights. However, without making any new findings, the court held that the School District had violated Article I, Section 7 of the Missouri Constitution.

On September 8, 1988, in response to a second motion by the School District, the trial court issued a third interlocutory Order. This Order sought to clarify previous Orders concerning whether the School District was required to add to its extracurricular program school-sponsored dancing, or merely to allow persons not connected with the school to use its buildings for dances. Final Judgment was also entered on September 8, 1988. On September 9, 1988, the trial court issued an "Addendum" to its third interlocutory Order, correcting a math error in the attorney fees awarded Plaintiffs.

The School District filed a timely appeal to the Final Judgment on Counts I and IV. Plaintiffs did not cross-appeal the Judgment against them on Counts II and III. Oral argument was held in the United States Court of Appeals for the Eighth Circuit on April 10, 1989. On September 1, 1989, the Panel unanimously reversed the trial court. On November 17, 1989, the full United States Court of Appeals for the Eighth Circuit, by a division of 5-4, declined to rehear this case *en banc*.

OBJECTION TO JURISDICTION

There are no student-Petitioners currently enrolled in the School District. Accordingly, this case requesting equitable and declaratory relief is now moot and should be dismissed for lack of jurisdiction in this Court. *Doremus v. Board of Education*, 342 U.S. 429, 432-33 (1952). *See also DeFunis v. Odegaard*, 416 U.S. 312 (1974) (*per curiam*).

Petitioners Jonathan Clayton, Michael Beagle, George Fox, and Amy Dianne Wolf graduated from the School District in May 1988. Similarly, Steve Blakley and Mark Flummerfelt graduated in May 1989, and David Mareth graduated in May 1987. Finally, Anna Svetlecic moved out of the School District and officially transferred her registration to a different school in December 1989. The balance of the parties are parents of these former students, thus their standing to maintain equitable claims for alleged constitutional injury is dependent on the continued enrollment of the student-Petitioners in the School District.[1]

[1] Should parent-Petitioners allege standing in their own right as parents of schoolage children other than the

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The parent-Petitioners argued below their status as taxpayers and citizens for purposes of standing. However, status as a School District taxpayer does not create standing in parents unless the offending policy "is supported by [a] separate tax or paid for from [a] particular appropriation or that it adds any sum whatever to the cost of conducting the school." *Doremus*, 342 U.S. at 433.

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student-Petitioners, this argument fails to prevent the case from being moot. Parental standing by the mother of a student was tried in *Doremus*, 342 U.S. at 432-33, but was denied. This denial of parental standing in *Doremus* was explained and distinguished in *Abington School District v. Schempp*, 374 U.S. 203, 224 n.9 (1963), and explained and followed in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 486 n.22 (1982). As this Court stated in *Valley Forge*:

> The plaintiffs [students and their parents] in *Schempp* had standing, not because their complaint rested on the Establishment Clause – for as *Doremus* demonstrated, that is insufficient – but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.

Because Policy 502.29 operates in the "negative," *i.e.*, it imposes upon students no religious beliefs or exercises, nor does it cause students to have to act in some way to avoid its operation. Students may engage in social dancing as often and with whomever they like, they simply cannot do so as one of the school's extracurricular activities. Parent-Petitioners' alleged constitutional injury is more comparable to that stated in *Doremus* than in *Schempp*. Thus, *Doremus* stands as an impediment to the parent-Petitioners having standing in their own right to carry on this appeal.

Nor are claims of "citizen standing" cognizable. *Id.* 342 U.S. at 431, 433.[2]

The Complaint, in addition to requesting injunctive and declaratory relief, sought nominal damages. The trial court awarded nominal damages of $1.00 against the School District in favor of each of the twenty-one Plaintiffs. When a claim for injunctive and declaratory relief has become moot, nominal damages will not save the cause from mootness.[3] The holding of these cases is the only workable rule, otherwise a claim for a mere $1.00 would become the routine artifice for circumventing the long-established rule of *Doremus*.

Because the student-Petitioners are no longer enrolled in the School District, we ask that the writ be denied because the case is moot.

STATEMENT OF THE CASE

Petitioners have stated events in a dramatic way so as to capture this Court's attention. In so doing, they bring about two distortions: (a) findings concerning the speech and activities of local citizens, including ministers,

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[2] *See also Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216-27 (1974) (U.S. citizenship insufficient); *Valley Forge*, 454 U.S. at 477-78, 482-83 (same).

[3] *Geraci v. Treuchtlinger*, 487 F.2d 590, 592 (2d Cir. 1973) (nominal damages); *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 387 (2d Cir. 1973) (nominal damages); *Kerrigan v. Boucher*, 450 F.2d 487, 489-90 (2d Cir. 1971) (nominal damages); *Duffy v. Quattrocchi*, 576 F. Supp. 336, 342 (D.R.I. 1983) (nominal damages). *See also Heitmuller v. Stokes*, 256 U.S. 359, 362 (1921) (court costs); *Washington Market Co. v. District of Columbia*, 137 U.S. 62 (1890) (*per curiam*) (court costs).

are blurred with the purpose of the School Board; and (b) findings concerning the religious background and personal beliefs of School Board members are blurred with the members' purposes in retaining the Policy. Because the Eighth Circuit's opinion hinged on maintaining these distinctions, we are restating the facts.

Policy 502.29 states in pertinent part:

> School dances are not authorized and school premises shall not be used for purposes of conducting a dance.

There was no evidence concerning when or for what purpose the Policy was originally promulgated. The Policy was already in force when all of the School Board members took office (T.729-730).

The evidence is undisputed that all of the School Board members' children regularly attended social dances in the community without being punished by their parents (T.756-757,816-817,851-852, 939-940,962, 995-996). Indeed, four of the six School Board members engaged in social dancing (T.569-570,816,850, 994), and some have even sponsored or chaperoned student dances (T.757,852,940,962-963).

In the spring of 1985, after receiving a student request for an extracurricular school dance, Superintendent Richard Place informally polled the School Board. The poll revealed that the School Board was split (3-3) regarding changing the Policy (T.579,733).

In February 1986, Plaintiffs requested to appear on the agenda of the regular School Board meeting, ostensibly for the purpose of organizing a school chapter of Students Against Driving Drunk (SADD). Also in attendance was Ted Davis, a local minister, who came to the

meeting for the purpose of lending his support to forming SADD (T.353-354). Following a presentation concerning SADD, the Plaintiffs unexpectedly requested the School Board to change the Policy to allow dances as an extracurricular activity at the school. After listening to the request, the School Board tabled the issue and placed it on the agenda for its next regular meeting (T.629).

Between the February and March meetings, each School Board member received a number of telephone calls on both sides of the issue. There were disputed findings concerning the religious content of the speech and other activities of some local citizens. Based on their church affiliations and on alleged statements by School Board members, disputed findings were also made concerning their personal beliefs and religious backgrounds.[4]

Immediately preceding the School Board's March 10, 1986, meeting, Dr. Place received word from the media that a large number of citizens intended to turn out for the meeting (T.636-637). The School Board members first gathered in the normal meeting area, while people desiring to attend the meeting were directed to the gymnasium. Seeing the sizeable crowd, the School Board members began informally discussing the Policy. A consensus was reached that if a number of people in the community wanted social dancing as an extracurricular

[4] Petitioners take great liberties with the facts in this case. As an example, Petitioners state on pages 6-7 of their Petition that Defendant Garrett stated that "the rule was in place because dancing was against the religious convictions of a majority of the community." Nowhere in the trial court's findings does such testimony appear.

activity, the School Board would change the Policy (T.639-640,807-808).

The School Board proceeded to the gymnasium and called the meeting to order. The crowd was estimated at 250 to 450 persons (T.641,811). Three Plaintiffs made presentations favoring a change in the Policy. The crowd's response was very cool (T.643), which was the first indication to the School Board that many in the crowd were not there to support a change in the Policy (T.644). Mr. Davis then made a presentation, which included reading a letter from the local Ministerial Alliance setting forth the reasons why the Policy should not be changed. The letter stated, in pertinent part:

> 1. First, the matter of duplication. Dancing is already available to those who wish to participate at the community center within our community. Why duplicate the same activity for no real purpose?
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> 2. Secondly, the matter of responsibility. The School System should not have to be responsible for the conduct of the students participating in dancing and subsequent activities surrounding dancing. There would have to be monitors at any of these dances. Why should school teachers, administrators, et al. be required to attend any more functions then [sic] are already required?
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> 3. Thirdly, the matter of time. Students participating in dances would be adding just one more activity to take them away from their studies. There are already enough extra-curricular activities for the students to be involved in with the emphasis on sports competition.
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> 4. Fourthly, the matter of social involvement. There is no merit in trying to justify dancing as a socially-edifying activity. There are more profitable ways for students to interact on a social basis.

> 5. Fifthly, the matter of moral conduct. From past history it is common knowledge that dancing involves other activities that are counter-productive and are considered unacceptable behavior in our community. Alcoholic consumption, to the point of "legal" drunkeness [sic], access to drugs and related paraphenalia [sic] would bring reproach upon our school's reputation. This would also negate the positive influence that the introduction of the S.A.D.D. Chapter in the Purdy School System would potentially have. Also the problem of teen-age pregnancy would be a greater risk if these circumstances were permitted to exist. We, as a community, need to learn lessons from other school systems that have seen and experienced the problems that have transpired due to the granting of permission for dancing on school property.

At the conclusion of his remarks, and without the prior knowledge or permission of the School Board, Mr Davis requested those persons who supported the Policy to stand. At least 80% of the crowd stood (T.646-648,812).

Following the presentations in the gymnasium, the crowd dispersed and the School Board recessed to its regular meeting area to continue with other agenda items. Much later that evening, the School Board discussed the presentations and agreed it was apparent that the vast majority of the citizens of the School District, as represented by those attending the meeting, wished to retain the Policy. Religion was not discussed. Although no formal vote was recorded, the School Board was unanimous (6-0) that no action be taken to change the Policy (T.656).

In mid-April 1986, Plaintiffs submitted an application requesting to rent the school cafeteria for a dance. It is undisputed that the Plaintiffs knew that this application

could not be granted by the School Board unless the Policy was changed, for the request ran counter to the language " . . . school premises shall not be used for purposes of conducting a dance." (T.125,663). While the School Board did not formally act upon Plaintiffs' rental application, it was understood by all that the request was denied because the Policy would not be reconsidered.

Later that fall, Plaintiffs' counsel wrote the School Board again requesting a change in Policy 502.29. The School Board declined to reconsider the March 10th decision, and reiterated the belief that a vast majority of the citizens in the School District did not wish to change the school's extracurricular program. The School Board further stated the hope that the controversy could be kept outside the schoolhouse walls because reopening the dance issue would disrupt the educational environment of the school. The letter also stated, "It should be pointed out that, in this Board's opinion, whether or not this district expends funds to sponsor dances is a community issue, not a religious issue."[5] Petitioners filed suit in December, 1986.

SUMMARY OF THE ARGUMENT

Three times Petitioners accuse the Eighth Circuit of doing only a "facial neutrality" analysis of the dance policy. (Petition, pp.11,12,17) This is *not* true! Similar to this Court's approach in *Bowen v. Kendrick*, 487 U.S. ___, 108 S. Ct. 2562, 2569-70 (1988), the Eighth Circuit first

[5] Accordingly, Petitioners' statement, on page 9 of the Petition, that the School Board did not dispute charges that its actions were of a religious nature, is false.

examined Policy 502.29 "on its face" (A-21 to A-23)[6] and then analyzed the purpose for the Policy on an "as applied" basis from the evidentiary findings below (A-23 to A-26).[7] The Eighth Circuit held *inter alia* that given a proper application of the cases decided under the Establishment Clause, many of the trial court's findings were not suited to answering the "religious purpose" question, and thus the inferences from these findings reached erroneous conclusions of law. In the words of the Circuit, "[W]e believe plaintiffs' and the district court's reliance on them [findings of fact] in this case is misplaced." (A-24)

Petitioners admitted at oral argument that "extracurricular dancing is a wholly secular activity." (A-22) Therefore, the "core" of their argument before the Eighth Circuit was that the Policy was in actual fact shown to have a religious purpose. However, as to the evidence purporting to show such "actual fact," the Eighth Circuit concluded as a matter of law:

1. Evidence that legislation harmonizes with a particular religious belief does not thereby make the law unconstitutional in purpose (A-25).

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[6] The Eighth Circuit embarked on the facial analysis when it said, "The district court's opinion does not rest on any adverse factual findings bearing directly on the content of rule 502.29 or on the circumstances surrounding its original passage. Nevertheless, the plaintiffs have framed their action as one to set aside the rule, and we thus turn to examine the rule itself." (A-21)

[7] The transition point in the Eighth Circuit's opinion is where it states, "We turn now to the core of plaintiffs' additional argument challenging the rule." (A-23)

2. Evidence of the beliefs and activities of local citizens, including ministers, is not probative of the purpose of the relevant governmental decision maker, herein the School Board (A-23 to A-26).

3. In any event, for the trial court to rely upon such evidence would raise serious First Amendment questions by disenfranchising "religious" citizens when participating in community debate (A-25 to A-26).

4. Likewise, evidence of the religious affiliation and personal beliefs of elected public officials cannot, for both practical and First Amendment reasons, be probative of the constitutionality of legislation (A-24 to A-25).

Even when the purpose of a law is consistent with the Establishment Clause, its effect can in some principal or primary way advance or endorse religion. Another way of stating the matter is: A law of "innocent" purpose can still be unconstitutional in its operation or impact. The Eighth Circuit concluded that the Policy had no unconstitutional effect (A-22 to A-23). Petitioners admitted in briefs and oral argument before the Eighth Circuit that Policy 502.29 is not only facially neutral but addresses a wholly secular subject matter. Moreover, it was conceded that in a school where such a policy had a basis in general morality, the rule would not violate the Establishment Clause. But the "effect" test is an objective measurement which asks: "Does a law impact religion regardless of its underlying motive?" The concession that an identical school policy but with a moral basis would be constitutional, logically admits that the Policy cannot have the primary effect of advancing or endorsing religion apart from its underlying subjective purpose. It

follows that Petitioners' claim succeeds or fails on the "purpose" test alone.[8]

For reasons that we now address, the foregoing conclusions of law by the Eighth Circuit are fully in accord with the decisions of this Court, and thus the Petition for Writ of *Certiorari* should be denied.

ARGUMENT

The question before this Court is *not* whether Policy 502.29 is anachronistic, at best a quaint reminder of bygone days. Simply because a school policy is thought by some to be old fashioned, it is not thereby unconstitutional. The *real* issue is whether public school officials may continue a long-standing practice of not including in their extracurricular program a social activity without being found to "make [a] law respecting an establishment of religion." U.S. Const. amend. I. It is not the School District's burden to defend the social prudence, educational value, or fiscal wisdom of the Policy,[9] or to prove that social dancing is not of equal benefit to its students as the school's many other extracurricular offerings. Rather, the sole matter before this Court is the far more modest task of determining the constitutionality of the Policy.

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[8] The Eighth Circuit also reversed the trial court's conclusion that there was excessive entanglement between the school and religion (A-23). Because Petitioners do not raise this question in their Petition, pursuant to the Rules of the Supreme Court of the United States, Rule 21.1(a), Petitioners have abandoned the issue.

[9] "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

The School Board members testified at trial that they decided to continue the Policy for moral, educational, and fiscal concerns, and that an apparent majority in this socially conservative community did not wish it changed. In so far as the Policy has a basis in morality, the objection was not to dancing *qua* dancing. Rather, the concern arises out of the view that a dance event is too often accompanied by such behavior as alcohol and drug abuse, fighting, and too much attention on teenage sexuality. Many of us, including perhaps those on the Court, may disagree that there is such a cause and effect relationship. But such disagreement does not make the Policy unconstitutional.

If it had been allowed to stand, the trial court's mandate would have called into question public school rules and decisions which have their basis in traditional morality. Rules against students swearing and using vulgarity, dress codes barring revealing or provocative attire, or punishing the possession of sexually explicit magazines are familiar school policies[10] and cannot be justified without falling back on a community's moral standards. As with Policy 502.29, Petitioners must concede that such school rules are not inherently religious, and it necessarily follows that such rules are not an establishment of religion.

Justice Jackson, concurring in *McCollum v. Board of Education*, 333 U.S. 203, 237-38 (1948), while fully

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[10] *Cf. Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (high school newspaper with articles on teenage sexuality); *Bethel School District v. Fraser*, 478 U.S. 675 (1986) (student assembly speech using explicit sexual metaphors).

agreeing that religion classes in public schools taught by local clerics were unconstitutional, warned against the very sort of claim Petitioners bring here:

> Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that, no matter what practice prevails, there will be many discontented and possibly belligerent minorities. We must leave some flexibility to meet local conditions, some chance to progress by trial and error.
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> . . . .
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> The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine . . . is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes.

Petitioners may dance as much and anywhere they like, they just cannot do so as an extracurricular activity at their school. The Policy may indeed seem antiquated to Petitioners, and perhaps many others, but it is not thereby unconstitutional.

I.

The first prong of the *Lemon* test presently requires that a legislature may not have as its preeminent purpose the imposition of a belief or practice that is inherently religious.

Although clinging to the verbal map of the tripartite test first set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13

(1971), Establishment Clause doctrine has evolved in this Court's case law since 1971. To survive Establishment Clause analysis, the first requirement in *Lemon* is that a "statute must have a secular legislative purpose." The thrust of that original formulation has now been, in significant respects, refocused. Presently, this Court has invalidated legislation under *Lemon's* first prong "only if it is motivated wholly by an impermissible purpose,"[11] or only when it can be said that the law's "pre-eminent purpose . . . is plainly religious in nature."[12] Conversely, this Court has said that "a statute that is motivated in part by a religious purpose" does not violate the purpose prong.[13] Thus, when government acts either out of reasons that are arguably secular, or with mixed secular and religious purposes, the first prong of *Lemon* is not violated.[14] Nor has the Court required that a "law's purpose must be unrelated to religion," for that would require government to "show a callous indifference to religious

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[11] *Bowen v. Kendrick*, 487 U.S. at ___, 108 S. Ct. at 2570. *See also Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

[12] *Stone v. Graham*, 449 U.S. 39, 41 (1980) (*per curiam*). *See also Edwards v. Aguillard*, 482 U.S. 578, 590 (1987) ("preeminent religious purpose"); *id.* 605 ("interference with the decisions of [school board] authorities is warranted only when the purpose for their decisions is clearly religious") (Powell, J., concurring).

[13] *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

[14] *See Carter v. Broadlawns Medical Center*, 857 F.2d 448, 454 (8th Cir. 1988) (upholding employment of Church of Christ deacon as chaplain at county hospital to counsel patients, outpatients, and relatives, notwithstanding mixed secular and religious purpose), *cert. denied*, 109 S. Ct. 1569 (1989).

groups."[15] Accordingly, as reformulated in cases since *Lemon*, the inquiry is whether the preeminent purpose behind legislation is to impose a belief or practice that is plainly religious in nature.

A. When Law and Religion Coincide

The Eighth Circuit held (A-25):

> The mere fact a governmental body takes action that coincides with the principles or desires of a particular religious group, however, does not transform the action into an impermissible establishment of religion.

This Court has repeatedly stated that parallelism between the beliefs of a particular religion and legislation does not *ipso facto* make the law religious for purposes of the Establishment Clause.[16] Rules of conduct consistent with religious tenets include laws against so-called victimless crimes such as gambling, alcoholism, prostitution, obscenity, homosexuality, and adultery. As Justice O'Connor stated in her concurring opinion in *Wallace v. Jaffree*, 472 U.S. at 70:

> Chaos would ensue if every such statute were invalidated under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go

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[15] *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987). *See also Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Forest Hills Early Learning Center v. Grace Baptist Church*, 846 F.2d 260, 263 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 837 (1989).

[16] *See, e.g., Bowen v. Kendrick*, 487 U.S. at ___, 108 S. Ct. at 2571 n.8; *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

> against the grain of religious liberty protected by the First Amendment.

Likewise, in *Harris v. McRae*, 448 U.S. 297 (1980), upholding the Hyde Amendment notwithstanding its vigorous support by the Roman Catholic Church and the bill's chief sponsor being of that denomination,[17] the Court said: "That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." *Id.* at 319.

B. Relevant Decision Maker: The School Board

As stated in *Amos*, 483 U.S. at 335, the purpose test of *Lemon* "aims at preventing the relevant governmental decision maker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." In *Amos*, the relevant governmental decision maker was Congress, not church lobbyists, clerics, and others who supported the amendment expanding the religious exemption in the Civil Rights Act of 1964.

In this case, in determining the purpose of the March 1986 decision to retain Policy 502.29, the Eighth Circuit was correct to look only at the purpose of the School Board, and not to the supposed "hidden motives" of local citizens, ministers, and others attending public meetings of the School Board. *See Edwards v. Aguillard*, 482 U.S. at 588, 591 (Louisiana legislature as relevant decision maker); *Wallace v. Jaffree*, 472 U.S. at 59-60 (Alabama

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[17] *See* Brief of Appellees, pp.173-177, filed in *Harris v. McRae*, 448 U.S. 297 (1980).

legislature); *Larson v. Valente*, 456 U.S. 228 (1982) (Minnesota legislature).

Petitioners have argued throughout this cause that because certain citizens in the School District who opposed changing the Policy were ministers or "religious" persons, the School Board's refusal to repeal the Policy was thereby freighted with a religious purpose. However, for the School Board to have taken into account that the desire of many citizens was to retain the Policy, does not thereby taint the purposes of the School Board members with the supposed *ratio decidendi* of their constituents. An elected public official may vote in accord with a constituent's will without being held to have adopted vicariously the constituent's motive, even assuming that hundreds of School District citizens had only one preeminent motive, which is manifestly unlikely. One may vote the same way as others, but not share their underlying motives.

C. Inhibiting Speech and Political Participation

All citizens are allowed to participate equally in public policy formulation. To exclude those who are informed in their moral vision by an underlying religious faith would deny them freedom of speech and their right to engage in the political process. Moreover, such a state of affairs would leave the domain of public policy formulation to none but the non-religious, and to those who would conceal the true origins of their moral values. Rather, it would seem that the interplay between the Free Speech and Establishment Clauses is designed so that all have space to speak, publicly and with candor.

The Eighth Circuit fully recognized the trial court's handling of the testimony of local citizens, including ministers, was tantamount to violating their free speech

and political rights, thus obviously a misapplication of the Establishment Clause (A-25 to A-26):

> [T]his approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions. In this case, the district court recognized "[r]eligious groups * * * have an absolute right to make their views known and to participate in public discussion of issues,". . . . Nevertheless, the court held "those views may not prevail," . . . even though these groups have long been legitimate participants in secular community debate, *see Bowen*, 108 S. Ct. at 2573.

Justice Brennan, concurring in *McDaniel v. Paty*, 435 U.S. 618, 640-41 (1978), provided a clear statement of the Supreme Court's attitude in this regard:

> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally. "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."
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> . . . .
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> In short, government may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as over involved in religion. Religionists no less than members of

> any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life (footnotes and citations omitted).

It appears that one of the means by which this Court has sought to avoid inhibiting freedom of speech and political participation of citizens is to insist that evidence of unconstitutional purpose focus on the "relevant governmental decision maker." The Eighth Circuit was correct to disregard evidence of citizens informing elected School Board members of their public policy views. Had the trial court's conclusions been allowed to stand, such a result would be anti-democratic because it would work a *de jure* discrimination adverse to the traditional moral views of "religious" citizens in the relevant political community.[18]

For Petitioners to suppose that government can ignore the moral dimensions of public policy-making is both *naive* and an *error of law*. It is naive, because it mistakenly confines notions of morality to purely private matters. That we live in a world of teenage pregnancy, racism, and drug abuse, would seem more than sufficient to explode the fallacy that any government, whether national, state, or local, can safely operate without being informed, indeed, guided, by a community's morality. It is an error of law, because the purpose of the separation

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[18] *See* L. Tribe, *American Constitutional Law*, 1275-84 (2d ed. 1988).

of church and state in American society is not designed to exclude the voice of religious-based morality from the public policy debate. Yet, a considerable part of Petitioners' evidence that Policy 502.29 was "religious" was the speech and political activity of local citizens who happened also to be identified with a religion.

D. The Deferential Motive Analysis

Because of the difficulty in determining the true motives of a group of lawmakers – as distinguished from their objective purpose[19]– for enacting a statute or promulgating a particular policy, the Court has avoided making motive-analysis part of the legal doctrine in most areas of constitutional law.[20] With the Establishment Clause, while not abandoning motive-analysis altogether, the Court has adopted a highly deferential inquiry. When no religious purpose appears either on the face of the challenged statute, or in its official legislative history, this Court has been inclined summarily to announce the first element of *Lemon* satisfied and move quickly on to the "effect" and "entanglement" prongs.[21] This Court has, in

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[19] Justice Scalia distinguished "purpose" from "motive" in *Edwards v. Aguillard*, 482 U.S. at 636 (Scalia, J., dissenting).

[20] *See, e.g., Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment."); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purpose are a hazardous matter").

[21] *See Mueller v. Allen*, 463 U.S. 388, 394-95 (1983), where, concerning the deferential application of the purpose prong in *Lemon*, the Court said: "This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."

most cases, easily found a permissible purpose in a statute's language simply by exercising common sense.

Justice O'Connor's discussion in *Wallace v. Jaffree*, 472 U.S. at 75, explains the methodology for courts to follow in deferring to a legislative act that is arguably secular. Justice O'Connor stated:

> Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

The Eighth Circuit here proceeded in the very manner suggested (A-22):

> [P]laintiffs conceded at oral argument . . . that extracurricular dancing is a wholly secular activity. . . . Further, the rule carries within its text absolutely no religious component, and there is no record evidence of any actual religious purpose connected with the rule's enactment or its textual requirements.

The Eighth Circuit's analysis did not stop here, however. It was Plaintiffs' "core" argument (A-23) that the School Board's actions in leaving the Policy unchanged in March 1986 were "tainted" with wholly religious motives. However, the trial court's findings in that regard did not support, as a matter of law, the inference that the School Board acted with an unconstitutional purpose. Indeed, if the trial court's inference was permitted to stand, it would raise serious constitutional questions concerning the rights of elected legislative officials. In the words of the Eighth Circuit (A-25):

> We . . . find no support for the proposition that a rule . . . becomes unconstitutional due only to its harmony . . . with the personal preferences of

> the officials taking action. . . . To make government action assailable solely on the grounds plaintiffs suggest would destabilize governmental action that is otherwise neutral. . . .
>
> We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards.

The Eighth Circuit's conclusions are supported by the cases decided in this Court. It is necessary to confine the probative evidence on legislative motive by reference to the defined authority of the judicial branch. This was stated pointedly by Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. at 74, where she said that inquiry into impermissible purpose must be "deferential and limited," because "a court has no license to psychoanalyze the legislators."[22] It would be unseemly for courts to engage in the business of conducting a virtual Testimonial Inquisition – summoning to the witness stand and probing in open court the personal religious tenets, backgrounds, and church affiliations of the relevant lawmakers.[23] As

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[22] A line of cases in this Court holds that judges are especially to avoid placing lawmakers on the witness stand to be interrogated as to their motivations back at the time a statute or rule was debated and adopted. *See, e.g., Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 n.18 (1977); *McGowan v. Maryland*, 366 U.S. at 469 (Frankfurter, J., concurring); *United States v. Morgan*, 313 U.S. 409, 422 (1941). *See also Discount Records, Inc. v. City of North Little Rock*, 671 F.2d 1220, 1222 (8th Cir. 1982) (survey of legislators voting for Sunday closing law not probative of religious purpose).

[23] A line of cases in this Court requires avoidance of inquiries into the significance of personal religious beliefs to

(Continued on following page)

Justice Brennan stated in his concurring opinion in *McDaniel v. Paty*, 435 U.S. at 641:

> Government may not inquire into the religious beliefs and motivations of officeholders – it may not remove them from office merely for making public statements regarding religion, or question whether their legislative actions stem from religious conviction (citation omitted).

A contrary rule would be tantamount to imposing a religious test for holding public office, *i.e.*, officials informed by their religious background and faith are disenfranchised, while officials ultimately moved by non-religious world views proceed unhindered. *See Torcaso v. Watkins*, 367 U.S. 488 (1961) (test oath violative of religious freedom).

The Eighth Circuit was also correct in holding erroneous the trial court's inferences from personal beliefs of some School Board members. America has a long and rich history of religious involvement in progressive movements from abolition in the 19th century to opposition to the arms race and for famine relief in the late 20th century. As the Eighth Circuit said, it is "unrealistic" (A-25) for Petitioners to suppose lawmakers cannot hold such faith

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(Continued from previous page)

either individuals or their denominations, including, presumably, those of relevant lawmakers. *See, e.g., Thomas v. Review Board*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation."); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (inappropriate to have NLRB second guessing whether religious reasons given by religious authorities are pretext); *Serbian Eastern Orthodox v. Milivojevich*, 426 U.S. 696 (1976) (no judicial review of dispute concerning meaning of church rules and doctrine); *United States v. Ballard*, 322 U.S. 78 (1944) (courts cannot challenge the truth or falsity of a religious claim, only assess its sincerity).

beliefs and retain their positions as elected public servants. *See* L. Tribe, *American Constitutional Law* 1277, 1280 (2d ed. 1988).

II.

The second prong of the *Lemon* test is an objective measurement requiring evidence, empirical or otherwise, that in its operation, a law has the primary effect of advancing or endorsing religion.

In applying the second prong of *Lemon*, this Court asks whether the principal or primary effect of the legislation is to "advance," "endorse," "inhibit" or "disapprove" religion. *County of Allegheny v. American Civil Liberties Union*, ___ U.S. ___, 109 S. Ct. 3086, 3100-01 (1989); *Lemon*, 403 U.S. at 612. One challenging a law must produce some empirical or other palpable evidence of religious impact. *Widmar v. Vincent*, 454 U.S. 263, 273-75 (1981); *Amos*, 483 U.S. at 337.

A. "Principal" or "Primary" Effect

The Eighth Circuit correctly held (A-22 to A-23):

> [T]he record does not fairly demonstrate that any religious doctrine is principally or primarily advanced by the Board's enforcement of the no-dancing rule. No student is prohibited from engaging in or refraining from extracurricular dancing should they choose to do so. Any arguably religious effect of the rule is indirect, remote, and incidental. To the extent plaintiffs contend the rule impermissibly endorses or conveys a message of governmental preference for a particular religious viewpoint concerning social dancing, we find nothing in the rule to suggest the District has "take[n] a position on questions of religious belief or * * * 'ma[de] adherence to a

religion relevant in any way to a person's standing in the political community (citations omitted).' "

On numerous occasions, this Court has found that an incidental or *de minimis* effect on religion is not violative of the Constitution.[24]

B. Objective Observer

With respect to the "endorsement" aspect of the review, Justice O'Connor has said that whether or not governmental action endorses or disapproves religion must be considered from the viewpoint of a "reasonable observer" or "objective observer." *County of Allegheny*, ___ U.S. at ___, 109 S. Ct. at 3121 (O'Connor, J., concurring); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. at 493, (O'Connor, J., concurring in part and concurring in judgment); *Wallace v. Jaffree*, 472 U.S. at 76 (O'Connor, J., concurring).

Petitioners have clearly disregarded the "objective observer" portion of the endorsement test, relying rather upon subjective feelings and appearances. The only evidence at trial of the Policy's impact was the testimony of the Petitioners. It would indeed be remarkable if Petitioners, having filed a lawsuit, did not now assert that they "felt" offended by the Policy. But if that alone made

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[24] *See, e.g., Bowen v. Kendrick*, 487 U.S. ___, 108 S. Ct. 2562 (1988); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Lynch v. Donnelly*, 465 U.S. 668; *Marsh v. Chambers*, 463 U.S. 783 (1983); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Harris v. McRae*, 448 U.S. 297 (1980); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Zorach v. Clauson*, 343 U.S. 306 (1952).

out a violation of the "effect" test, every Establishment Clause case would be won by the plaintiffs.

Policy 502.29 operates in the "negative," in that it does not require any student to do anything. The Policy does not prohibit any student from engaging in or refraining from social dancing should he or she choose to do so. Indeed, the uncontradicted testimony was that student social dances have routinely been held each year off school premises; no student has been disciplined by the school for such activity; students have engaged in social dancing on school-sponsored trips; a student was allowed to study dancing in a nearby city for credit; and dancing has been accepted in activities such as school plays, athletic events, and musical productions (T 307,679-684). Further, there was no testimony concerning harassment of one student by another as a result of the Policy, and no evidence of peer pressure to conform to a no-dancing view.

C. Secular Nature of Social Dancing

Petitioners admit in their Petition (p.12) that social dancing is a wholly secular activity. This fact was also acknowledged by the trial court, admitted by Petitioners during oral argument before the Eighth Circuit, and found by the Eighth Circuit.

What appears in this Court's analysis, when applying the *Lemon* test, is that the rigor of the purpose and effect prongs are made more strict or relaxed, as the case may be, depending on whether the challenged statute is or is not "inherently religious." For example, in *Bowen v. Kendrick*, 487 U.S. at ___, 108 S. Ct. at 2572, the Court stated:

> The services to be provided under the AFLA are not *religious in character*. . . . [I]t is clear that the

> AFLA takes a particular approach toward dealing with adolescent sexuality and pregnancy – for example, two of its stated purposes are to "promote self-discipline and other prudent approaches to the problem of adolescent premarital sexual relations. . . ." [B]ut again, that approach is not *inherently religious*, although it may coincide with the approach taken by certain religions (emphasis added).

The Court further stated, 108 S. Ct. at 2576:

> The facially neutral projects authorized by the AFLA – including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care . . . are not themselves *"specifically religious activities,"* and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations (emphasis added).

Likewise, in *Stone v. Graham*, 449 U.S. at 41-42, this Court stated:

> The pre-eminent purpose of posting the Ten Commandments on schoolroom walls is *plainly religious in nature*. The Ten Commandments are *undeniably a sacred text* in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to *arguably secular matters*, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness (emphasis added).

The measure of a "law respecting an establishment of religion," from the objective observer's viewpoint, is necessarily affected by whether the law or policy in question is "inherently religious," "clearly religious," "plainly

religious," or not "arguably secular,"[25] *i.e.*, "religious" in the conventional sense of that which is widely regarded as devotional, spiritual, liturgical, or as involving worship, a confession, a creed, or veneration of a deity. By way of example, Professor Laurence Tribe suggests:

> [N]o plausible establishment clause challenge could be made against the use of the eagles as an official symbol, despite its religious significance to some people; but a decisive challenge could be launched against use of a cross, whose religious significance is clear to nearly all.

L. Tribe, *American Constitutional Law* 1187 (2d ed. 1988).

Policy 502.29 is facially neutral and involves an admittedly secular activity. Because the Policy is not "inherently religious," it thereby cannot have the primary effect of advancing or endorsing religion.

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[25] *See also Wallace v. Jaffree*, 472 U.S. at 58 ("wholly religious character"); *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968) ("sectarian conviction"); *Abington School District v. Schempp*, 374 U.S. at 224 ("pervading religious character"); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962) ("very religious").

CONCLUSION

In light of the foregoing authorities and arguments, the School District requests that the Petition for Writ of *Certiorari* be denied.

Respectfully submitted,

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JONATHAN CLAYTON, a minor, by CONNIE CLAYTON, his next friend; Steve Blakley, a minor by Tressia Blakley, his next friend; David Mareth, a minor, by Marlene Mareth, his next friend; Mark Flummerfelt, a minor, by Carolyn Flummerfelt, his next friend; Michael Beagle, a minor, by James M. Beagle, his next friend; George Fox, a minor by Joan Fox, his next friend; Amy Dianne Wolf, a minor, by Frances Ann Wolf, her next friend; Anna Svetlecic, a minor, by Vickie Svetlecic, her next friend; Connie Clayton; Tressia Blakley; Vickie Svetlecic; Walter Welch; Sherry Welch; Robert Mareth; Marlene Mareth; Michael Flummerfelt; Carolyn Flummerfelt; Frances Ann Wolf; Joan Fox; Howard Fox, Jr.; and James M. Beagle,

Petitioners,

vs.

RICHARD M. PLACE; Glen Garrett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry; All in their individual and official capacities and Purdy R-2 School District,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF MISSOURI SCHOOL BOARDS ASSOCIATION AND MISSOURI ASSOCIATION OF SCHOOL ADMINISTRATORS AS AMICI CURIAE OPPOSING THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Eighth Circuit correct to conclude that a rule concerning a wholly secular activity, absent any evidence of religious purpose either in its text or related to its enactment, cannot be held to violate either the purpose requirement or the primary effect test of *Lemon* solely because it is consistent with moral values which some school board directors and members of the community have attributed to religious beliefs?

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INTEREST OF AMICI CURIAE

Amicus curiae, Missouri School Boards Association (MSBA), is a not-for-profit corporation organized for the purpose of promoting public education and assisting locally elected boards of education in performing their lawful functions. The membership of the association represents more than ninety-five percent of the children attending public schools in the state of Missouri. It is the only statewide organization representing the interests of locally elected boards of education.

The MSBA is a delegate driven organization. Annually, representatives from each member district adopt a statement of mission and beliefs and resolutions to guide the activities of the association. The 1989-90 Mission and Beliefs includes the following statements:

> "The American tradition of separation of church and state must be maintained."
>
> "The autonomy of local boards of education is essential."

The Missouri Association of School Administrators is a not-for-profit corporation representing the interests of public school administration. Its membership is comprised of the public school administrators within the state. MASA annually adopts a statement of beliefs and resolutions to guide the activities of the association. Like MSBA, MASA is committed to both the separation of church and state and control of educational policy by locally elected officials, as shown in the following statements:

> "Separation of church and state must be maintained."
>
> "The autonomy of the local boards of education should be preserved. MASA Basic Beliefs, 1989-90.
>
> "MASA supports the maintenance of strong local control through duly elected boards of education." MASA Resolution E. 14, 1989-90.

Neither organization supports a policy prohibiting school dances. Neither organization believes that the appropriateness of such a policy is an issue in this case. While both organizations would adamantly oppose policies that violate the Establishment Clause, they are in agreement that locally elected school boards do not violate the Establishment Clause by continuing a policy regarding the extracurricular use of facilities that is neutral toward religion and which is consistent with the shared values of the community.

The strength of our system of locally elected educational policymakers is in its ability to respond to local values and concerns. If facially neutral policies that are consistent with prevailing community values can be converted into violations of the Establishment Clause because such values are commonly attributed to religious faiths, then school board members must evaluate not only policies, rules and their implementation, but also the religious beliefs of constituents in order to avoid violating the Establishment Clause. Such an analysis would produce absurd results, and would be unworkable in practice.

SUMMARY OF ARGUMENT

The Eighth Circuit correctly held that Policy 502.29 of the Purdy R-II School District, prohibiting the use of school facilities for a school dance, does not violate the Establishment Clause of the First Amendment. Under the *Lemon* test, the policy has a secular purpose, and does not have the primary effect of advancing religion.[1]

[1] Only the purpose and effect components of *Lemon* will be discussed since the entanglement component has not been

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In order to fail the secular purpose test of *Lemon*, the Supreme Court has made it clear that a policy or law must be completely motivated by religious considerations. *Lynch v. Donnelly*, 465 U.S. 668, 680, 104 S. Ct. 1355, 1362 (1984).

The cases in which the Supreme Court has found a secular purpose lacking have involved challenges to laws or policies relating directly to primary religious activities and beliefs, such as the posting of the Ten Commandments, *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192 (1980) (per curiam); requiring a minute of silence for *prayer* and meditation, *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2579 (1985); devotional bible reading, *School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963) and biblical explanations of the origin of man and the world, *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266 (1968).

In contrast, Policy 502.29 relates to the use of facilities for extracurricular dancing – not an inherently religious or primary religious activity or belief. The finding of the trial court that the rule was "inherently religious to the Purdy R-2 School Board" is a *non-sequitur*. Appendix, Petition for Writ of Certiorari, 11. Hereinafter e.g. (A.11). An inherently religious rule would be so regardless of the particular board or circumstances surrounding its enactment. In addition, as the Eighth Circuit's opinion points out, the petitioners have conceded that extracurricular dancing is a secular activity, and there is no evidence of religious purpose in the text of the rule or related to its enactment. (A.22) The trial court relied instead on evidence of the

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preserved by petitioners under Rule 21.1(a), Rules of the Supreme Court of the United States.

religious beliefs of citizens and board members[2] to find evidence of a religious purpose. The Eighth Circuit correctly held that such evidence alone is insufficient to find a violation of the Establishment Clause.

> "We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards. In addition to its unrealistic nature, this approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions." (A.25)

It is an appropriate secular purpose for elected school board members to continue a policy which is consistent with the shared moral values of the community.[3] This is true regardless of whether patrons or board

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[2] Putting aside the issue of the propriety of evaluating official action based on individuals' religious beliefs, it is unclear what facts in the record served as the basis for the trial court's finding that the policy was inherently religious to the *board*. The trial court found as a fact that Garrett thought it might be time to change the rule, but feared "a lot of heat", Terry said he favored a change unless "controversy" resulted, and Stevens favored the change. (A.4, Finding of Fact 16) Since the facts do not even purport to show that more than half of the board's six members had personal religious beliefs against dancing, how could the *board* be shown to have personal religious motives to continue the rule. Three members do not constitute a quorum, and do not even account for a majority of a quorum of the full board. Section 162.301, RSMo., 1986. *Also see* Petition for Writ of Certiorari, pp. 13-14.

[3] The trial court noted in its Findings of Fact that a board member who voted to allow dancing at the school was defeated at the next election. (A.4) This finding underscores the secular interests of board members in being responsive to their constituents.

members themselves attribute such values to religious convictions, because moral values against the use of alcohol, pornography, pre-marital sex, provocative dress or abortion can likewise be attributed to religious views. Under the trial court's analysis, the district could not prohibit the use of its facilities under the Establishment Clause for extra-curricular programs on adolescent sexuality or abortion counseling if patrons and board members attributed their moral values against such programs to religious convictions.

Under the second part of the *Lemon* test, the Eighth Circuit's conclusion that the policy did not have the primary effect of advancing religion was also correct. As Judge Fagg pointed out in the opinion of the Eighth Circuit, the trial court relied on the same reasoning to conclude that the rule violated both the purpose and effect test of *Lemon*. (A.24) That reasoning was based on the religious backgrounds of board members and citizens. (A.24) Based on this reasoning the trial court found that "the primary effect of this rule is to endorse the tenets of that particular religious group in Purdy who believe that social dancing is sinful." (A.13)

The question under the primary effect test is whether the rule actually promotes or endorses religion. This test, adopted by the Court in *County of Allegheny v. ACLU*, ___ U.S.___, 109 S. Ct. 3086 (1989), was first described by Justice O'Connor as whether the practice "in fact conveys a message of endorsement or disapproval". *Lynch v. Donnelly*, 465 U.S. at 690, 104 S. Ct. at 1368. (O'Connor, J. Concurring)

In evaluating the display of a creche, as well as a Christmas tree and menorah in *County of Allegheny*, this Court agreed that the endorsement test is an objective evaluation of the message sent by the questioned practice, asking what people may "fairly understand" to be

the purpose given the context in which it occurs. *County of Allegheny*, ___U.S. at___, 109 S. Ct. at 3102. "Every governmental practice must be judged in its unique circumstances to determine whether it [endorses] religion." *Id.*

Petitioners and the trial court would have this court believe that the proper context upon which to focus in this case is the fact that Purdy is a religious community where many people attribute their beliefs against dancing to religion, including *some* members of the board. However, this approach is subjective, and focuses exclusively on the religious aspects of the context. It ignores the secular motives of an elected public body responding to political debate on a moral issue in the community when a substantial majority have clearly stated their views. Given this context, it is hard to believe that an objective observer would perceive a "negative" imprimatur of preference for religion by the board based on the refusal to change a rule *prohibiting* a secular activity, neutral on its face, and without any evidence of religious motive related to its enactment. Petitioners' statement that the *board's* actions were contrary to the views of the superintendent and *at least* half of the board, in addition to being a contradiction in terms,[4] makes it even more difficult to draw such a conclusion. Petition for Writ of Certiorari, pp. 13-14.

Under such circumstances, the Eighth Circuit was correct to reject "the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action." (A.25) To hold otherwise would

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[4] The board cannot act except by a majority of a quorum, which is four members in this case. Section 162.301, RSMo., 1986.

require boards to inquire into the religious beliefs of constituents in order to evaluate their abilities to respond to public debate on many issues that arguably have a religious component. Boards would be required to reach different conclusions on the same rule depending on the religious makeup of the community.

The cases clearly illustrate that even where laws or rules have conferred much more direct benefits on religion, the Supreme Court has characterized the benefit to religion as remote, indirect or incidental. *Lynch v. Donnelly*, 465 U.S. at 681-683, 104 S. Ct. at 1363-1365.

Because the rule does not have a religious purpose and does not have the primary effect of endorsing religion, the Petition For Writ of Certiorari should be denied.

ARGUMENT

I. The Eighth Circuit correctly held that the continued enforcement of Policy 502.29 of the Purdy School District did not violate the religious purpose test of *Lemon*.

In determining whether a particular statute, policy or rule violates the Establishment Clause, the first consideration is whether the rule in question has a secular purpose. *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S. Ct. 2105, 2111 (1971).

The question of what degree of religious influence is necessary to invalidate a law or policy has been repeatedly answered by this Court. For example, in *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355 (1984), the Court considered a challenge to the presentation of a nativity scene by a city as part of its Christmas program. Chief Justice Burger, writing for the Court, 465 U.S. at 680, 104 S. Ct. at 1352, stated:

> "The court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded that there was *no question* that the statute or activity was *motivated wholly by religious considerations.*" (emphasis added).

The Court used similar language to describe the secular purpose criterion of the *Lemon* test in striking down a state-mandated moment of silence for meditation and prayer:

> "For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion . . . , the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985).

Likewise, the Court invalidated a requirement that the Ten Commandments be posted in public schools because they are plainly "religious in nature" and "do not confine themselves to arguably secular matters." *Stone v. Graham*, 449 U.S. 39, 41-42, 101 S. Ct. 192, 194 (1981) (per curiam).

The Court upheld the Adolescent Family Life Act against a claim that the Act's provision of funding to religiously affiliated organizations and prohibition against the use of such funds for family planning or the promotion of abortion services violated the Establishment Clause. *Bowen v. Kendrick*, ___U.S.___, 108 S. Ct. 2562 (1988). Chief Justice Rehnquist reaffirmed the Court's interpretation of the purpose prong of the *Lemon* test, stating for the Court ___U.S. at___, 108 S. Ct. at 2570:

> "Under the *Lemon* standard, which guides "[t]he general nature of our inquiry in this area," *Mueller v. Allen, supra*, 463 U.S. at 394, 103 S. Ct. at 3066, a court may invalidate a statute only if it is *motivated wholly* by an impermissible purpose, . ." (emphasis added).

Cases in which the Supreme Court has held that the purpose prong of *Lemon* was violated illustrate that a secular purpose was found lacking only when the statute or rule supported primary religious activities and beliefs such as prayer, devotional readings, religious concepts of creation or worship.

In *Stone v. Graham* (striking down the posting of the Ten Commandments in classrooms), the Court stated, 449 U.S. at 42, 101 S. Ct. at 194:

> "Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day."

Justice Stevens, writing for the majority to overturn a required minute of silence in public schools for voluntary prayer and meditation in *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479 (1985), cited unequivocal testimony that the only legislative purpose of the act was to return voluntary prayer to the schools. He stressed, 472 U.S. at 56-57, 105 S. Ct. at 2490, that the state "did not present evidence of *any* secular purpose". In a footnote, Justice Stevens also cited the Fifth Circuit with approval, 472 U.S. at 44 n.22, 105 S. Ct. at 2483 n.22:

> "The Fifth Circuit has explained that prayer is a *primary religious activity* in itself . . . " *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981). The state may not employ a religious means in its public schools." (emphasis added).

Other cases in which the Court has found no secular purpose consistently focus on primary religious activities and beliefs: *School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963) (devotional reading of Bible and recitation of Lord's Prayer); *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962) (recitation of prayer); *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266

(1968) (teaching of evolution forbidden because inconsistent with biblical view of origin of man). It is also notable that with the exception of *Epperson*, the rules invalidated as having religious purposes in these cases involve positive attempts to inculcate religious belief or to send an unequivocal message of endorsement. Although the law in *Epperson prohibited* teaching evolution it concerned a matter central to theology: the origins of man and the world. In addition, the prohibition directly affected existing curricula.

The no-dance rule is not an active inducement or endorsement of primary religious activities and beliefs such as prayer, devotional activities and worship. The rule cannot actively induce or endorse because it operates in the negative. The rule is morally based, and does not operate to influence the views of children on a subject so central to theology as the origins of the world. In addition, the rule does not affect curriculum in the Purdy R-II School District.

The finding of the trial court that the policy is inherently religious *to the Purdy R-II School Board* was a *non-sequitur.* (A.11) An inherently religious policy would be inherently religious regardless of the circumstances or the board of education which adopted the rule. Apparently the trial court characterized the no dance rule in this manner in order to place it in the same category as devotional prayer or the Ten Commandments, for which no secular purpose has been found by the Supreme Court.

The distinct qualitative differences between Policy 502.29 and the statutes and rules discussed in the foregoing cases which have been found to violate the purpose test are an indication that the policy is not wholly motivated by religion. However, it is not necessary to rely on a negative inference to establish a secular purpose in this case, since a clearly identifiable secular purpose exists.

There is no doubt that a relationship exists between strongly held moral values of members of the Purdy community, and the maintenance of the no-dance policy. As the Findings of Fact of the trial court indicate, individuals in the community attribute the moral value against dancing to their religious beliefs. (A.5-8)

However, as Judge Heaney observed in a case upholding a school board policy permitting observances of holidays having both a religious and secular basis:

> "Government involvement in an activity of unquestionably religious origin does not contravene the Establishment Clause if its present purpose and effect is secular. *McGowan v. Maryland*, 366 U.S. 420, 445, 81 S. Ct. 1101, 1115, 6 L.Ed.2d 393 (1961). Thus although the rules permit the schools to observe holidays that have both a religious and secular basis, we need not conclude that the school board acted with unconstitutional motives." *Florey v. Sioux Falls School Dist. 49-5*, 619 F.2d 1313, 1315 (8th Cir. 1980), cert. denied 449 U.S. 987, 101 S. Ct. 409.

The Supreme Court has acknowledged on numerous occasions that the endorsement or promulgation of moral values that are religiously based does not necessarily violate the purpose prong of *Lemon*. As Justice O'Connor observed, concurring in *Wallace v. Jaffree*, 472 U.S. at 69-70, 105 S. Ct. at 2479:

> "A statute that ostensibly promotes a secular interest often has an incidental or even primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the establishment clause. For example, the state could not criminalize murder for fear that it would thereby promote the Biblical command against killing." (O'Connor, J., Concurring).

The question under the first prong of the *Lemon* test as applied to this case is whether the continued enforcement of a policy preventing a discretionary extra-curricular activity in response to the conservative moral values of the community, which values are attributed by district patrons to their religious beliefs, is wholly motivated by religion.

When the issue is examined in the proper context, it is apparent that the motive of the *board* is essentially secular. It is entirely appropriate and expected that elected policymakers will adopt policies consistent with the moral climate of the community they represent. Board members need not insulate their decisions from the moral values of the community they represent simply because those values have religious overtones. To do so would effectively eliminate those groups from the political process. As the Eighth Circuit concluded: "In addition to its unrealistic nature this approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular debate." (A.25-26) The question of whether the policy is a moral or religious issue cannot be a function of whether the value is anachronistic, or shared by the majority of citizens in the United States. The shared values of a majority of taxpaying citizens in a community are of obvious secular concern to elected public officials, whether those citizens attribute those values to religious beliefs or otherwise.

A similar issue was presented to the Supreme Court when it was claimed that the Hyde Amendment, which restricts use of Medicaid funds for abortions, advanced the beliefs of the Roman Catholic Church. *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671 (1980). In upholding the law, Justice Stewart wrote for the majority, 448 U.S. at 319, 100 S. Ct. at 1689:

> " . . . it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.' *McGowan v. Maryland*, 366 U.S. 420, 442, 81 S. Ct. 1101, 1113, 6 L.Ed.2d 393."

The Court further observed, 448 U.S. at 319, 100 S. Ct. at 2689:

> "The Hyde Amendment is as much a reflection of the 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion."

Although the trial court acknowledged in its Conclusions of Law that "the school board adopted the reasoning of the majority of townspeople, including the strongly held religious views" (A.12), it refused to evaluate the secular purpose issue in this context. Instead, the trial court and petitioners rely on this finding to prove an improper purpose.

However, as the Eighth Circuit held, since the rule concerns a secular subject and there is no evidence of a religious motive in its text or related to its enactment, evidence of personal religious beliefs of board members and citizens does not prove a religious motive.

> "First, plaintiffs conceded at oral argument that extracurricular dancing is a wholly secular activity . . . Further, the rule carries within its text absolutely no religious component, and there is not record evidence of any actual religious purpose connected with the rule's enactment or its textual requirements." (A.22)

> "We also find no support for the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or the personal preferences of the officials taking action." (A.25)

In finding that there was no secular purpose for the no-dance rule, the trial court found that it was "particularly significant" that the district suspended and eventually abolished its policy permitting "outsider" rentals of the facilities. (A.13) Based on this fact, the court stated that it was clear that the secular reasons for the district's policy were pretextual. The fact that the district followed its policy is not evidence of pretext.[5] Secondly, the moral issue to the community is the same regardless of who organizes the school dance, and as discussed *supra*, this is a secular concern to elected policymakers. Regardless, it was not inappropriate to suspend outsider rentals in order to evaluate the application of the policy to such rentals. The trial court's conclusion of a pretextual purpose based on this fact was improper. *See Florey v. Sioux Falls School District*, 619 F.2d at 1315 (rejecting a similar inference).

II. The Eighth Circuit correctly held that the continued enforcement of Policy 502.29 of the Purdy School District did not have the primary effect of endorsing religion.

Even if a policy or statute has a secular purpose, the second part of the *Lemon* test requires invalidation if the primary effect is to advance or inhibit religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S. Ct. 2105, 2111 (1971). The trial court concluded that the primary effect of Policy 502.29 is to "endorse the tenets of that particular religious group in Purdy who believe that social dancing is sinful." The trial court further found that the policy placed "the state's imprimatur on one particular religious belief." (A.13-14)

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[5] The policy, by its terms, prevents school property from being used for any dance, regardless of sponsorship.

To support this conclusion, the trial court cited language in several cases decided by the Supreme Court. However, an examination of those very cases illustrates that the supposed benefit to religion in this case does not even come close to satisfying the primary effect test of *Lemon* as interpreted by the Supreme Court.

For example, the trial court cited the concurring opinion of Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. at 687-694, 104 S. Ct. 1366-1370, where she first proposed an "endorsement" test for Establishment Clause analysis later adopted by the Court in *County of Allegheny v. ACLU*, ___U.S.___, 109 S. Ct. 3086 (1989). Under this test, the relevant inquiry of the effect prong of the *Lemon* test is whether the practice "in fact conveys a message of endorsement of disapproval". *Lynch*, 465 U.S. at 690, 104 S. Ct. at 1368. (O'Connor, J. Concurring) The trial court purported to utilize this test in concluding that the state had placed its imprimatur on a religious belief.

It is notable that Justice O'Connor's endorsement test was satisfied in *Lynch* although the presentation of the nativity scene obviously had religious significance because it was not intended to endorse Christian beliefs. *Lynch v. Donnelly*, 465 U.S. at 692, 104 S. Ct. at 1369. It is hard to imagine that a rule prohibiting the use of school facilities for an optional extra-curricular activity, neutral on its face, could be held to be intended to endorse religious beliefs while a depiction of the birth of Christ does not, regardless of the context.

The trial court relied on evidence of the rule's correspondence with the personal religious beliefs of board members and citizens to show religious effect as well as purpose. (A.24) However it failed to apply the test as described in *County of Allegheny*. It is clear under both *Lynch v. Donnelly, supra*, and *County of Allegheny* that the

test evaluates the government's message objectively, asking what people may "fairly understand" to be the purpose, given the context. *County of Allegheny,* ___U.S. at ___, 109 S. Ct. at 3102. "Every governmental practice must be judged in its unique circumstances to determine whether it [endorses] religion." *Id.*

The observations of the Eighth Circuit in reversing a district court decision that a public hospital chaplaincy program violated the secular purpose test in *Carter v. Broadlawns Medical Center,* 857 F.2d 449 (8th Cir. 1988), are also descriptive of the trial court's error in this case. 857 F.2d at 454:

> "The District Court in this case slipped into the same legal error made by the court in *Lynch v. Donnelly,* by focusing on the religious purpose in isolation from the larger context, which reveals a valid secular purpose. Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause, . . . ".

The trial court's evaluation was subjective, completely ignoring the obvious secular motives of an elected public body responding to political debate on a moral issue in a community where a substantial majority of citizens have clearly stated their views. The fact that citizens and *some* board members attributed their moral views to religious affiliations is but one factor. Other factors that should have been considered in evaluating the boards "action" to retain the rule are: 1) as petitioners concede, *at least* three board members, as well as the superintendent, supported changing the rule, but expressed concern about public reaction – i.e. "controversy" and "a lot of heat". Petition for Writ of Certiorari, pp. 13-14, Finding of Fact 16 (A.4); 2) the rule relates to a secular activity; 3) the rule operates in the negative, requiring the finding of a "negative" imprimatur; 4) religion was never presented to students as a basis for the

rule; 5) the text of the rule includes no religious component; and 6) substantial support for the rule existed in the community.

The secular aspect of elected officials failing to change an existing rule after substantial support was shown for the rule during vigorous public debate dwarfs the religious component of correspondence with religious beliefs in much the same way that the forty-five foot Christmas tree in *County of Allegheny* predominated over the otherwise religious effect of the menorah. *See County of Allegheny*, ___U.S. at ___, 109 S. Ct. at 3313.

In view of these facts, the Eighth Circuit was correct to reject "the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action." (A.25)

Any other conclusion would require elected officials to inquire into the religious beliefs of constituents in order to evaluate their abilities to respond to public debate on many issues that arguably include a religious component. Such inquiry would produce different results in different places for the same question depending on the religious makeup of individual communities. Although this court has strived for flexibility in applying the *Lemon* test, the trial court's interpretation in this case would cause too many inconsistent results.

The trial court cited *Wallace v. Jaffree*, 472 U.S. at 53 n.38, 105 S. Ct. at 2488 n.38, where James Madison's observations on the free exercise of religion are quoted, as support for its conclusion that the primary effect of the rule is to advance religion. However, in *Wallace* the Court never reached the primary effect test, concluding that the required minute of silence and voluntary prayer violated the secular purpose prong of *Lemon*. In any event, a rule

preventing the discretionary extra-curricular activity of conducting school dances cannot seriously be compared to a law requiring a minute of silence for prayer in terms of advancing religious beliefs.

The trial court also cited *School District of City of Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S. Ct. 3216, 3226 (1985), to point out that the question of primary effect must consider the fact that children are in their formative years. But that case involved the use of public school teachers at public expense teaching in public programs at sectarian schools. The risk that parochial school children would perceive an endorsement under such facts cannot seriously be compared with the risk that students would perceive an imprimatur under Policy 502.29. School dances are not part of the curriculum. Students were never told that dancing is wrong, much less sinful.

The primary effect of advancing religion cannot be found where, as here, the benefit to religion is clearly "indirect, remote or incidental", *Lynch v. Donnelly*, 465 U.S. at 683, 104 S. Ct. at 1365; *Widmar v. Vincent*, 454 U.S. 263, 273-274, 102 S. Ct. 269, 276 (1981).

CONCLUSION

To focus exclusively on the religious aspects of a law or policy which reflects moral values without considering the secular context of political debate or shared community values is to enter the "twilight zone" of Establishment Clause analysis. This is particularly true where the rule concerns a secular activity, is secular on its face and includes no evidence of a religious purpose related to its enactment. The task of drawing the line between social mores and religious beliefs becomes even more treacherous if reliance is placed exclusively on evidence of

personal religious beliefs of citizens and elected officials in evaluating the issues of religious purpose and effect. This is why the Supreme Court has required laws to be lacking in any secular purpose to fail the purpose prong of *Lemon*, and why the Court has invalidated legislation only when it promotes primary religious activities or beliefs, such as prayer, worship, non-secular use of sacred writings, or religious doctrine concerning creation. Likewise, the need of elected officials to respond to constituents on issues relating to moral values which may correspond with religious beliefs is a good reason not to invalidate legislation, policies or practices under the primary effect test where the benefit to religion is indirect or remote, and eclipsed within the context of public debate on a public policy issue.

Under the trial court's analysis, a school district could be enjoined under the Establishment Clause from enforcing a custom, practice or policy preventing the use of its facilities for extra-curricular family planning clinics if patrons and board members attributed their views opposing such a use to their religious beliefs. The trial court's analysis would not be limited to the facts of this case. The fact that the stricken rule has few sympathizers or is seen as reactionary or even bad educational policy should not distract from the trial court's errors of law. Dancing adds glamour to this case, but is obviously not the real issue.

Policy 502.29 is secular on its face, operating only to prevent an otherwise optional extra-curricular secular activity on district property rather than actively attempting to instill a religious viewpoint. There is no evidence of religious purpose in its text or related to its enactment. The actions of the board in continuing the rule were essentially secular. The Eighth Circuit correctly concluded that under such circumstances, the evidence presented

of religious affiliations and beliefs of board members and constituents could not, as a matter of law, cause the rule to have a religious purpose or a primary effect or endorsing religion. Although Policy 502.29 may be consistent with the values and religious convictions of the Purdy community, it confers only a remote, indirect benefit, if any, on religion.

For the reasons stated, *amici curiae* Missouri School Boards Association and Missouri Association of School Administrators request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 89-1348

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JOHNATHAN CLAYTON, a minor, by CONNIE CLAYTON, his next friend; Steve Blakley, a minor by Tressia Blakley, his next friend; David Mareth, a minor, by Marlene Mareth, his next friend; Mark Flummerfelt, a minor, by Carolyn Flummerfelt, his next friend; Michael Beagle, a minor, by James M. Beagle, his next friend; George Fox, a minor, by Joan Fox, his next friend; Amy Dianne Wolf, a minor, by Frances Ann Wolf, her next friend; Anna Svetlecic, a minor, by Vickie Svetlecic, her next friend; Connie Clayton; Tressia Blakley, Vickie Svetlecic; Walter Welch; Sherry Welch; Robert Mareth; Marlene Mareth; Michael Flummerfelt; Carolyn Flummerfelt; Frances Ann Wolf; Joan Fox; Howard Fox, Jr.; and James M. Beagle,

Petitioners,

vs.

RICHARD M. PLACE; Glen Garett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry; all in their individual and official capacities and Purdy R-2 School District,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

ARGUMENT

Respondents and their *amici* argue that this Court should deny review of this Establishment Clause case for two reasons: (1) they claim that this Court lacks jurisdiction because the named plaintiff-schoolchildren have graduated from Purdy High School; and (2) they assert that, under a revisionist interpretation of the Establishment Clause, the Eighth Circuit panel decision should stand. Neither argument supports a decision to deny *certiorari*.

1. Petitioners Have Standing in their Capacities: (1) as Parents with Children Still in the Purdy School System; (2) as Citizens and Taxpayers Who Are Directly Impacted by a Local School System Which Advances Certain Religious Beliefs; and (3) as Recipients of Nominal Damage Awards.

The short answer[1] to respondents' Objection to Jurisdiction is that several of the plaintiff-parents have children who are still in the Purdy School System and who are still affected by the "no dancing" policy of the Purdy School Board. By way of example, petitioners Joan and Howard Fox have children ages 6, 8, 12 and 14 in the Purdy School System, thus giving the Fox family standing into the next century.[2] Transcript at 158; *see School District*

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[1] As this Court noted in *Bowen v. Kendrick*, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520, 548 n.15 (1988), it is unnecessary to consider whether all plaintiffs have standing where some of them clearly have standing.

[2] As respondents are aware, the Welch and Wolf families also have children who are still in the Purdy School System.

(Continued on following page)

of Abington Township v. Schempp, 374 U.S. 203, 224 (1963).[3] To deny review at the present juncture would simply invite relitigation of this case in the names of other children, with the net result bringing this case back to this Court's doorstep three years hence.

In light of the powerful symbolic impact of the "no dancing" rule on the entire Purdy community, plaintiffs also have standing as citizens and taxpayers in the Purdy School District. As Judge Lay noted in his dissent from the denial of rehearing, the "no-dancing" rule is "no less obvious than a monument anchored to the schoolhouse lawn pronouncing: 'THIS SCHOOL ADHERES TO THE BASIC TENETS OF THE MINISTERIAL ALLIANCE CHURCHES.' " A-36, 37. In this sense, the instant case is indistinguishable from other cases where citizens and taxpayers had standing to challenge governmental endorsements of religion even in the absence of any expenditure of public funds. *E.g., County of Allegheny v. ACLU*, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (citizens challenged religious symbols erected on government property at private expense); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (plaintiffs had "taxpayer standing" to challenge use of public property as a chapel); *ACLU v.*

(Continued from previous page)

Deposition of Frances M. Wolf, at 4; Deposition of Walter R. Welch, at 6.

[3] Respondents' reliance on *Doremus v. Board of Education*, 342 U.S. 429 (1952), is ill-founded because that decision rested on the fact that neither the parent nor student alleged any on-going actual injury. Here, respondents' interference with the efforts of the plaintiff-parents to place their children in a public school environment free of sectarian religious dogma constitutes an on-going injury to them and their children as well. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

Rabun County Chamber of Commerce, 698 F.2d 1098, 1108-09 (11th Cir. 1983) (plaintiffs had "citizen standing" to challenge erection of a cross on public property).[4]

Finally, plaintiffs continue to have standing by virtue of the trial court's award of "legal damages" in the nominal sum of $1.00 per plaintiff. In a number of recent cases, nominal damages have been awarded for a civil rights violation, without any accompanying subject matter jurisdiction problem. *E.g.*, *Coleman v. Turner*, 838 F.2d 1004 (8th Cir. 1988); *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135 (6th Cir. 1985); *see generally Carey v. Piphus*, 435 U.S. 247 (1978) (nominal damages provide an important method of vindicating violations of constitutional rights). Here, the nominal damage awards for the past violation of plaintiffs' constitutional rights plainly avoids any claim of mootness. 13A C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3533.3, at 265-66 & nn. 9-10 (1984) (disapproving cases cited in footnote 3 of respondents' Opposition Brief). For all the above reasons, respondents' Objection to Jurisdiction must be overruled.

2. The Revisionist Interpretation of the Establishment Clause Advanced in Respondents' Opposition Brief Underscores the Critical Importance of this Case.

The simple fact remains that there is no credible purpose underlying the Purdy School Board's

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[4] These cases, involving endorsements of religion by local governmental bodies, plainly contrast with cases such as *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), which involved generalized attacks against certain federal governmental practices.

maintenance and enforcement of the "no dancing" rule *other than the advancement of the religious belief that social dancing is a sin*. This religious belief has no counterpart in secular morality; instead, it is a distinctive, idiosyncratic tenet of certain fundamentalist churches, including those in the Purdy community. It also is beyond dispute that the "no dancing" rule stands as a powerful official endorsement of that fundamentalist religious creed. Under these circumstances, respondents' contention that the rule "merely coincides" with certain religious beliefs must be rejected.

Nevertheless, in an effort to advance their revisionist interpretation of the Establishment Clause, respondents have offered a number of material misstatements in their opposition brief. For example, respondents' claim that "[r]eligion was not discussed" by the Purdy School board, Opposition Brief at 8, is plainly inaccurate. The trial court expressly credited the testimony relating out-of-court admissions by school board members regarding the religious basis of the rule and found that the board members' in-court denials of a religious purpose were incredible:

> The board members were not particularly credible, either in demeanor or in the substance of their testimony . . . This Court is skeptical that it heard the complete story concerning the board members' deliberations of the rule and the religious significance of the opposition to dancing in Purdy. A-11, 12.

Simply put, Establishment Clause scrutiny cannot be circumvented by presenting false testimony at trial. *See Edwards v. Aguillard*, 482 U.S. 578, 96 L. Ed. 2d 510, 107 S. Ct. 1261 (1987).

Similarly, respondents distort the record when they refer to the purported secular justifications for the opposition to dancing. *See* Opposition Brief, at 7-8. Significantly, respondents' selective quotation from the Ministerial Alliance position statement omits the thinly veiled religious references contained in its conclusion:

> [B]eing motivated by an Eternal and Parental Love for the Student Body of this School we submit this report and humbly request that you do not authorize School sponsored Dancing in Purdy Schools.

Moreover, the trial court expressly found that the school board members were fully aware of the pretextual nature of the purported secular bases for the opposition to dancing:

> [The] board's courtroom statements that they accepted the minister's statements at face value defy reality. A-12.

As this Court consistently has held, the assertion of self-serving statements of secular purpose cannot foreclose the appropriate inquiry into the actual purpose of the challenged governmental action. *See Edwards v. Aguillard* 482 U.S. 578, 96 L. Ed. 2d 510, 520-21 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

The record in this case and the trial court's factual findings leave no doubt that the conscious purpose and pre-eminent effect of the Purdy School Board's actions were the promotion of fundamentalist religious beliefs as official school policy. As in *Epperson v. Arkansas*, 393 U.S. 97, 107-08 (1968), the absence of any legitimate policy considerations, "other than the religious views of some

citizens," compels the conclusion that "fundamentalist sectarian conviction is and was the law's reason for existence." Accordingly, this case falls squarely in line with the bedrock principle that the Establishment Clause "means at the very least that government may not demonstrate a preference for a particular religious sect or creed." *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 106 L. Ed. 2d 472, 502 (1989).

In the final analysis, respondents' opposition to the petition for *certiorari* is a request that the members of this Court blind themselves to reality and turn their backs on the members of minority faiths in the Purdy community. Fortunately, this Court has never retreated from the principle that the type of official religious discrimination practiced by the Purdy School Board "has no place in the jurisprudence of the Establishment Clause." *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 106 L. Ed. 2d 472, 502 (1989). To vindicate the rights of the minority students and parents in the Purdy community, and to reaffirm the fundamental promise of governmental neutrality concerning religious matters embodied in the Establishment Clause, petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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